

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,739

No. 17,740

LESMARK, INC.,

v.

PRYCE, et al.,

Appellant,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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(i)

STATEMENT OF QUESTIONS PRESENTED

Appellant contractor, by written agreement with appellee owners, agreed to build a flower shop in accordance with plans and specifications as prepared by appellee architect. The plans and specifications showed existing footings some twelve inches below adjoining buildings on each side of the proposed building. Employees of the contractor began to dig on the lines indicated by the plans and after some two hours the adjoining buildings gave evidence of movement. All digging was halted; it was discovered that no footings existed as shown on the plans, and the plans were subsequently revised to secure the existing buildings.

The owners of the property adjoining each side of the proposed flower shop sued the owners, the contractor and the architect for damages sustained by each building. Cross-claims by the owners against the contractor and architect, and by the contractor against the architect were filed.

The lower court, sitting without a jury, found in favor of the adjoining property owners against appellee owners on the theory that "as owners they have a liability established in law". The court also awarded a judgment to the adjoining owners against the contractor on the theory that the proximate cause of the damages was the negligence of appellant contractor in making the excavations. The court also found that appellee owners were entitled to complete indemnity from appellant contractor and awarded judgment against appellant contractor "for any liability incurred by the Charrons as a result of the judgment in favor of the plaintiffs in this case".

The lower court dismissed the cross-claims against the appellee architect.

In assessing damages, the lower court awarded appellee Pryce loss of rent from the time her building was damaged until she resold it, plus cost of repairs, plus the difference in selling price of the same building when it was resold by new owners a year and a half later. The

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court also accepted numerous bills as evidence of necessary repairs without the testimony of any expert. The award over given appellee owners against the appellant contractor included \$2,000.00 for attorneys' fees, although no evidence on this item was introduced at the trial.

Appellant contractor appealed the verdict and judgments against it but appellee owners failed to appeal the judgment awarded against them. Subsequently they moved for a stay of execution of said judgment, which was denied by both the lower court and by this court. Their motions for leave to file a supersedeas bond was also denied by this court. Thereupon, appellee owners paid the judgment and appellee adjoining property owners moved to dismiss the appeal as to each of them on the ground that the judgments appealed from have been fully paid and satisfied.

In this context, the first question presented is the right of the appellee owners to indemnification from appellant contractor, since by their failure to appeal the judgment against them they have prejudiced the rights of the indemnitor. In this regard appellant contractor proposes to show that the judgment against the appellee owners was improper.

The second question presented concerns the various awards of damages and the award of attorneys' fees. Since the liability for damages to adjoining property of an adjoining owner differs from the liability of a contractor or excavator who causes damage by negligence, the award by the lower court based on the measure of damages applied to a negligent act, against the adjoining owner was improper. The award of attorneys' fees was not based upon any evidence and it is contradicted that the owner appellees incurred no liability for attorneys' fees and paid none. The award of loss of rent beyond the period when the premises were available for rental was error and the award of \$7,500.00 for decrease in value based upon a subsequent sale has no basis in law.

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The final question presented is whether the lower court erred in refusing to hold the architect liable in view of the fact that the plans and specifications were erroneous and were relied upon by the contractor..

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LESMARK, INC.,

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Appellees.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from the entry of judgment by the trial court in favor of the appellees. Jurisdiction of the Court to hear the appeal is based upon 28 U.S. Code Sec. 1291.

STATEMENT OF CASE

Pryce and Ash, adjoining property owners, filed separate suits against Lesmark Inc., appellant corporation, as contractor builder, Mr. and Mrs. Charron, as owners, and Edmund Dreyfuss, as architect, for damages sustained to real property as the result of alleged negligence and common law liability. (J.A. 1-13) The suits were consolidated for trial and were tried without a jury. (J.A. 29)

The appellant corporation is a building contractor and was awarded the contract to construct a flower shop in accordance with plans and specifications prepared by the architect retained by the owners. The site of the proposed building was 1919 Eye Street, N. W., in the District of Columbia, on which land there was an old brick structure which was removed to make place for the new building. Pryce owned the property immediately to the east and Ash owned the property immediately to the west.

The plans and specifications called for the tying in of the new building to footings some twelve inches below the existing buildings on each side. The owners retained no control over the actual construction which was to be performed by the contractor.

Within two hours after the contractor's employees began digging the foundation for footings, the building adjoining on the east began to move and all work was halted. Under the supervision of the District of Columbia authorities shoring was installed, the plans were revised and thereafter, after approval by the District of Columbia, the building was completed.

At the trial it was established that although the plans and specifications showed existing footings under the adjoining buildings, no such footings were there; that in order to tie into the supposed footings, it had been necessary to dig below where they were shown to exist. (J.A. 133)

The lower court awarded a judgment to appellee Pryce for \$21,400.00 and included therein the sum of \$9,800.00 for loss of rent from the date of the accident to the date she sold the building. (J.A. 170) The evidence was undisputed that the premises were restored to a habitable and tenantable condition by January 1, 1960, a total of five months from the date the premises were vacated. The previous tenant paid \$805.00 per month and had had no lease; and the appellee Pryce had refused some tenants and had also refused to offer the building for rent other than to a single tenant who would agree to lease the entire building.

The lower court also allowed appellee Pryce \$7500.00 for reduction in market value of her property on the theory that "the best test of the market value of these premises was the price at which the property was sold a year or two after the so-called accident". (J.A. 170) In addition, Pryce was awarded \$4100.00 for repairs, although no proof was offered that the amounts paid for such repairs were either necessary or reasonable. (J.A. 170)

The appellee Ash was awarded a judgment in the sum of \$3,472.00 for repairs to his building, although the proof offered to support this claim established that in actual fact Ash had renovated and improved his building. (J.A. 171)

The lower court concluded that the owners (appellees Charron) had a liability "established in law" and awarded judgments to Ash and Pryce as noted above against appellees Charron. (J.A. 169) Appellant Lesmark Inc. was found to be negligent and judgment was awarded against it in the same amount. Appellees Charron were awarded judgment over against Lesmark Inc. based upon a theory of indemnification owed Charron, and, in addition, Charron was awarded judgment for \$2,000.00 for attorneys' fees. The claims against appellee Dreyfuss were dismissed. (J.A. 171)

Appellant Lesmark Inc. appealed the judgments entered against it and appellees Charron failed to note an appeal within the time allowed. Thereafter it attempted to stay execution of the judgment against it by motions in the lower court and in this court, both motions were denied and appellee Charron has paid the judgments of each appellee adjoining property owners.

STATEMENT OF POINTS

The Court erred as follows:

1. In awarding judgment for counsel fee in the sum of \$2,000.00 to Charron as no evidence was introduced to support such an award.
2. In awarding a judgment in favor of Robert Ash and Isabel C. Fenton (Pryce) in that the evidence failed to establish liability on the part of the appellant, or that if any negligence was attributable to the appellant, such negligence was not the proximate cause of the damage.
3. In dismissing the cross-claim against Edmund W. Dreyfuss, and in failing to find that appellee Dreyfuss' negligence was the proximate cause of the damage.
4. The evidence adduced was insufficient to support the award of damages to appellees Ash, Pryce and Charron.
5. The measure of damages applied by the Court was contrary to the evidence and the law.
6. In awarding judgment against the appellee Charron in that no evidence was adduced to support the liability of Charron, and that such an award was contrary to the evidence and the law; therefore, the award in favor of Charron against Lesmark, Inc. was without foundation in law.

SUMMARY OF ARGUMENT

An adjoining property owner is not liable for damages to realty on adjacent property unless such damage is caused by his negligence. In this case, the adjoining property owners were held liable although no negligence was attributed to them; the verdict being based upon the assumption that there is a common law liability. Therefore, the verdict against the owners was erroneous and the verdict based upon indemnification over against the contractor was erroneous.

The failure of the owners to appeal the lower court judgment against them and to allow the indemnitor to defend against this judgment is of such a substantial detriment to the indemnitor that the agreement of indemnification should not be enforced.

The payment by appellees Charron of the judgment awarded appellees Pryce and Ash has rendered moot this appellant's appeal of that judgment; however, if this Court would consider that appeal, it should reverse it because the contractor should not be held liable for following the plans and specifications as prepared by the owner's architect. The actual amounts awarded as damages and counsel fees were not based upon a correct theory of law and should be set aside.

ARGUMENT

I

The Trial Court Erred In Entering Judgment Against Appellees, The Charrons, And Allowing Judgment Over Against The Appellant

This action was originally filed by the appellee, Isable C. Fenton (J.A. 1) by a complaint designated for negligence. It alleged, inter alia, that the appellees, Charrons, were liable for damages to the appellees Fenton (Pryce) by reason of acts of negligence on its part in the making of certain excavations on an adjoining property. The evidence adduced during the course of the trial established that the appellees, Charron,

employed an architect, appellee, Dreyfuss, to handle all necessary matters concerning the construction of a store building on his property. The appellees, Charron, testified that: (J.A. 131)

Q. What did you do with respect to proceeding with the razing of the old building and building a new one? A. All of this was turned over to Mr. Dreyfuss, that's the architect, and it was left in his hands.

Thereafter it developed that said Dreyfuss procured the services of the appellant, Lesmark, Inc., as an independent contractor for the construction of said building. Although no evidence was adduced during the course of the trial relating to any action on behalf of the appellees Charron and that no control of any nature was retained by him, at the termination of the trial the Court entered judgment against this appellee making the following finding as to liability: (J.A. 169)

"In finding the defendants Walter S. and Marie L. Charron liable, the Court does so upon the premise that as owners they have a liability established in law."

The Court continued its ruling stating:

"The Court further finds that the proximate cause of damage to these plaintiffs was the negligence of the defendant Lesmark, Inc. in making the excavations which resulted in the vertical movement of the walls of the premises at 1917 I Street, and 1921 I Street."

It is apparent from the Court's finding that no negligence on the part of the appellees Charron was found to exist.

Under the common law which is still recognized in the District of Columbia, the adjoining owner of property owes a duty of lateral support only insofar as the soil is concerned, and where there is a structure on the adjoining realty liability springs into existence only upon the showing of negligence on the part of the adjoining owner.

In the early case of Dixon vs. Wilkinson, 9 MacArthur Reports, D.C. 425, the Court held:

"If a man digs upon his own land, and uses such care as an ordinarily prudent man would use in making excavations and building his walls, he is not liable to an adjoining lot-owner, whose house has been injured thereby."

The Court of Appeals of Maryland in Mullan et al v. Hacker,
49 A2 640 (Md. 1946)

"It is well settled, that the right of lateral support applies only to the soil in its natural condition. It does not apply to buildings on the land. See: Norther Transportation Co. v. City of Chicago, 99 U.S. 635, 25 L. Ed. 366, 339

Where an excavation is made by a landowner on his own land for a proper purpose and it is not done negligently, unskillfully, or with improper motives, any damage occasioned to a building on adjoining land is *damnum absque injuria*."

Tompson on Real Property, Vol. 2 sec. 612, page 231

"It is the duty of the owner of a building to protect it from injury by excavation upon the adjoining land, upon receiving notice of any intended excavation which would naturally result in an injury to the building. It is held that personal knowledge of the progress of the intended work is equivalent to notice"

Sec. 613, page 233: Where the adjoining land is burdened with the additional weight of a building, the process of excavating must be carried on with sufficient care and skill so as not to injure the building by the manner in which it is done. Ordinary care and skill must be used in such case, and a liability for damages arises if any injury occurs to the adjoining building from a lack of such care and skill. If the owner of the building endangered by the proposed excavation has received proper notice, the party making the excavation is responsible only for actual or positive negligence in the manner of doing the work.

1 American Jurisprudence 2nd

Sec. 49, page 724: If the excavator uses such care as an ordinarily prudent person would use under the circumstances of the particular case in making the excavation, he is not liable for the consequences; but he is liable in damages if

the injury to his neighbor is occasioned by the negligent and unskillful manner in which the excavation is made or maintained.

Sec. 52, page 728: Ordinarily, however, with absence of statute or agreement requiring him to do so, an excavator is not obliged to protect buildings or other structures on adjoining premises by supporting them or shoring them up. Thus, it is held that one who uses reasonable care in removing lateral support owes no duty to protect adjoining buildings by underpinning or shoring. It is generally held to be the duty of the owner to shore or prop up his own building so as to render it secure during the progress of the work.

Assuming, arguendo, that the damage to the adjoining property resulted from the negligence of the appellant, not one scintilla of evidence was introduced to establish agency as between the appellant and the appellees Charron, in fact it developed during the course of the trial that the appellant, Lesmark, Inc., was an independent contractor. It is the position of the appellant that the judgment entered against the appellees, the Charrons, had no foundation in law and that therefore the judgment awarded in favor of these appellees over against the appellant was in error.

There have been numerous decisions determining that where an owner employs a contractor to construct a building that such employment is presumed to be for work done in a lawful and not in a negligent manner and that if the owner does not himself exercise any directions as to how the work is to be done, the owner is not responsible for any wrongs that the independent contractor may commit in the course of the work. See: Myer v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Barnes v. Waterbury, 82 Conn. 518, 74 A. 902; Harrison v. Kiser, 79 Ga. 588, 4 S.E. 320; Crenshaw v. Ullman, 113 Mo. 633, 20 S.W. 1077; Neumann v. Greenleaf, 73 Mo. App. 326; King v. Livermore, (N.Y.) 9 Hun. 298; Schulhofer v. Mulhave, 50 Misc. 658, 99 NYS 489; Jackman v. Rosenbaum, 263 Pa. 158, 106 A. 238, affd. 260 U.S. 22, 67 L. 107; Laycock v. Parker, 103 Wis. 161, 79 N.W. 327; Stockgrowers Bank v. Gray, 24 Wyo. 18, 154 P. 593. (1916).

Subsequent to the entry of judgment against the appellees, the Charrons, the appellant filed notices of appeal having said notices served on each of the appellees and commenced to prosecute the necessary procedures in perfecting this appeal. However, the appellees, the Charrons, neglected to file the required notices and upon becoming aware of their position then moved this tribunal for a stay of execution on the judgment entered against them until such time as this appeal had been finalized. Upon this Court's denial of said motion, the said appellees then moved this Court for permission to file a supersedeas bond which motion was also denied. Thereafter, the appellees, the Charrons, satisfied the judgment entered against them and sought to have the judgment in a similar amount over against the appellant perfected by the trial Court. The actions of the appellees have so seriously impaired and prejudiced the rights of the appellant that in the event this appeal relating to the judgment entered in favor of the appellees, Ash and Pryce, against the Charrons are dismissed as being moot, the effect will be to destroy the right to appellate review to which the appellant, Lesmark, Inc., has an absolute right to pursue.

II

Measure Of Damages Applied And Computed By Lower Court Was Erroneous

A. With respect to the award to appellees Pryce and Ash against appellant Lesmark Inc. -

(a) The award to appellee Pryce of \$9,800.00 for alleged loss of rent is contrary to the evidence and the law. The evidence is undisputed that at the time of the accident the entire premises were rented on a month-to-month basis to one tenant who could leave by giving thirty days' notice. The monthly rental was \$800.00. (J.A. 55)

The premises were vacated on August 1, 1959, and restored to a habitable condition by January 1, 1960; however, the lower court allowed appellee Pryce a recovery from August 1, 1959, through December 15, 1960, which was when the property was sold. (J.A. 179)

The evidence is clear that appellee Pryce made no real effort to rent the premises once they were restored to a tenantable condition; she refused to consider any tenant who would not agree to lease the entire building; and she was more concerned with renovating the building and selling it. (J.A. 63)

In Higgins v. Los Angeles Gas & Electric Co., 158 Cal. 355, 115 Pac. 313, an action was brought by the owners of a building for damage caused by an explosion to the building which had been rented to tenants. The court held that the plaintiff was entitled to recover such amount as the jury might find that "he really lost in rents by reason of the premises being destroyed by the explosion during such time as it would take with reasonable diligence to repair such building". Even though the plaintiff in that case did not restore the building, the measure of damages was the rent for the period required to repair the building. In our case, if appellee Pryce is entitled to recover loss of rent, it should be \$2,300.00, the loss of rent of \$4,025.00 less expenses of \$1,725.00. (J.A. 48)

(b) There is no evidence to sustain the award in the amount of \$7,500.00 to the appellee Pryce for alleged reduction in market value of her property. It is clear that the lower court did not rely upon any expert testimony, or, indeed, testimony of any kind, in coming to its conclusion that \$7,500.00 should be awarded. In his oral opinion, Judge Tamm stated: "and the Court will award * * * \$7500.00 representing the difference between the price at which plaintiff sold her building and the price which the building subsequently commanded when it was sold or resold a year or two later". (J.A.170) There was no testimony as to what the buyer from appellee Pryce spent to refurnish the building and no testimony as to the state of the market in the immediate

area. The court could take judicial notice that all property values in the area of 17th to 20th Streets, N. W., have increased substantially. What the building sold for, by a new owner, two years later, has no probative value as to reduction in market value. The fact that the purchaser from appellee Pryce was more resourceful and energetic in their selling the property should not act as a penalty against the appellant.

"The general principle upon which compensation for injuries to real property is given, is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature; in such a case the measure of damages is the diminution in the market value of the property. If the injury caused a total or partial loss of the land for a limited time, the diminution in rental value is the measure. One of these two measures is always applicable. If the injury is easily repairable, the cost of repairing may be recovered. But it must be shown that the repairs were reasonable; and if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is always the true measure of damages. Strictly speaking, therefore, the cost of repairs is not the measure of damages, but only evidence of the amount of damages.

* * *

"Both cost of repairs and permanent depreciation cannot be recovered in the same case. * * *" 9th Ed. Vol. 3, Sedgwick on Damages, Sect. 932.

The authorities seem to be unanimous in the view that, where there is injury to adjoining land or improvements, a recovery may be allowed either for the cost of restoring the premises to their former condition or the diminution or depreciation in value of the premises damaged, whichever is less. In other words, if the cost of restoring the premises to their former condition is less than the depreciation in value, the damages are measured by the cost of restoration. On the other hand, a recovery for loss in value may be allowed providing it is not greater than restoring the cost of the premises to their former condition. 1 Am. Jur. 2d, Adjoining Land Owners, Sect. 75. See also Annotation 36 ALR 2d 1253. See: Levi v. Schwartz, 95 A. 2d 322 (Md. 1953).

The situation is not dissimilar to a suit for damages to an automobile where a recovery may be allowed for the cost of repairs, but no allowance can be made in addition thereto for depreciation in value-- it must be one or the other and not both. There is no reason why any different rule should apply to the instant situation, whether plaintiff labels this item as "permanent damages" or reduction in market value. It is true that there was some testimony that some floors may have been uneven, but we submit there was absolutely no testimony to indicate that any dollar value was placed on such damage in arriving at fair market value, and, indeed, the witness who testified concerning values did not allocate any amount therefor, nor to the so-called "bad reputation" of the building. This witness simply testified as to fair market value before and after the incident involved predicated on the sales price in December 1960 as compared to a later subsequent sale of the building at a higher price. We submit, therefore, that there is not only no evidence to support this award of \$7,500.00, but such an award is contrary to the authorities cited above.

(c) The award of \$4,100.00 in damages for cost of restoration was contrary to the evidence and the law. The test, as set forth by the authorities, is that damages should be allowed for the reasonable cost of restoring the premises to as good a condition as they were in before the injury. In our case the court made no allowance for ordinary wear and tear and depreciation of each of the items involved. (J.A. 168-171) Moreover, the court accepted the owner's testimony that each of the items was damaged as a result of the accident and that the bills were fair and reasonable and required no testimony as to reasonableness or necessity. (J.A. 38)

In Cooper v. Sillers, 30 App. D.C. 567, an action was brought by Sillers against Cooper for damages alleged to have been sustained as a result of the use of a party wall. Evidence was produced establishing that the wall was damaged and cracked as a result of its use in constructing Cooper's building. Our Court of Appeals approved

the lower court charge to the jury to the effect that if they found Cooper liable, they could award only the reasonable cost of restoring the physical condition of the house, and "that the measure of damages can only be the cost of restoring the premises to as good condition as they were in before the injury". (Emphasis ours.)

By contrast, however, in the instant cases, the Court goes far beyond the yardstick of "as good a condition as they were in before the injury"; no allowance has been made for ordinary wear and tear; no allowance is made for the life expectancy of decorating jobs, elevator repairs (including the elevator cable), linoleum, and the like. Testimony on behalf of the appellee Pryce indicates that she had never redecorated the interior of the building since 1946 or 1947, and that she had never repaired or replaced the linoleum floors to the building since that time.

There was testimony from the appellees' own witnesses to the effect that decorating and painting jobs last approximately three to five years; that linoleum has a life expectancy of one to fifteen years, depending upon the amount of traffic; that an elevator cable had a life expectancy of approximately fifteen to twenty years, and that the cable in the Pryce building had not been replaced since it was installed about 1946; that it was not essential to take down and store the electrical fixtures and air conditioning equipment in the Pryce building; and similar testimony along these lines, all of which tends to establish beyond question that the award to each of the appellees herein requires this appellant to put the premises back in a far better condition than they were in before the damages were sustained, and that appellees' buildings were therefore improved beyond the reasonable limitations required by law. If a reasonable allowance were made for wear and tear and ordinary life expectancy, a recovery of not more than approximately 25% of the amounts awarded would be justified on the record.

B. With respect to the award to appellees Charron of \$2,000.00 attorneys' fees -

This award was based upon no testimony whatsoever. Counsel for appellees Charron, in his closing argument to the Court, requested an award and stated that in his opinion \$2250.00 would be reasonable. (J.A. 167)

The District of Columbia Code, Sect. 11-1501, provides that in actions at law attorneys' fees may not be taxed to either party, unless provided by law. The Code does not provide for attorneys' fees in such a case as this. Rosden v. Leuthold, 274 F.2d 747.

And in cases where attorneys' fees are allowed there must be proof that the fees are reasonable, necessary, paid or incurred. U.S. v. Reed, 31 A. 2d 673.

In our case, there is no provision in the D. C. Code for attorneys' fees; and, there is no evidence that such fees were either paid or incurred by appellee Charron. (J.A. 185)

C. With respect to the award of damages to appellee Ash -

The testimony established that this appellee improved his building, redecorated it, and remodeled it to a condition far superior to its condition before the accident. (J.A. 75-81)

III

The Lower Court Erred In Failing To Find Appellee Dreyfuss' Negligence Was The Proximate Cause Of The Damages

The plans and specifications showed footings at the bottom of both adjoining party walls and required the contractor to tie the new building into and under the indicated footings. (J.A. 133) The contractor proceeded to do so in reliance upon the plans and specifications. Actually no footings existed at the base of the adjoining walls and when the contractor's employees began to dig, there being no support under the

existing walls, the foundations of the existing buildings were moved. The architect's only answer was to state that when the contractor discovered that no footings existed he should have stopped and called him. (J.A. 154) At that point the damage was done and the only remedy available was to revise the plans and provide adequate support.

A contractor who constructs in accordance with the plans and specifications is not responsible for defects caused by incorrect plans and specifications.

Hill v. Polar Pantries, 219 S.C. 263, 64 S.E. 2d 885 (1951);

Pine Bluff Hotel Co. v. Monk & Ritchie, 122 Ark. 308, 183 S.W. 761 (1916);

Louisiana Molasses Co. v. LeSassier, 52 La. Ann. 2070, 28 So. 217 (1900).

The failure of the contractor to check the plans before putting them to use does not excuse the architect from the consequences of an error in the plans.

Chiaverini v. Vail, 61 R.I. 117, 200 A. 462 (1938).

CONCLUSION

It is respectfully submitted that the trial Court erred in granting judgment against the appellees, the Charrons, and thereafter awarding judgment in said appellees favor against the appellant on the basis of the indemnification agreement, that the measure of damages applied and computed was erroneous, and that the finding in favor of the appellee, Dreyfus, was without foundation in fact or law requiring the judgments entered by the lower Court be vacated.

Respectfully submitted,

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Cross	84	51
Redirect	110	64

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James W. Harris			
Direct		173	82
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William Evan Dripps			
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Direct		244	101
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James J. Madden			
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Lawrence E. Gehley			
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Raymond T. Berry			
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JOINT APPENDIX

[Filed Aug. 26, 1959]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ISABEL C. FENTON
4411 Reno Road, N.W.
Washington, D. C.,

Plaintiff

v.

Civil Action No. 2364-59

WALTER S. CHARRON
Also known as Walter S. Sharon
2920 Pennsylvania Ave., S.E.
Washington, D. C.

MARIE L. CHARRON
2920 Pennsylvania Ave., S.E.
Washington, D. C.

MICHAEL M. ABRAMS
930 - 26th Street, N.W.
Washington, D. C.

EDMUND W. DREYFUSS
1019 - 15th Street, N.W.
Washington, D. C.

NICHOLAS C. MANDRAGOS
Route 1, Box 40
Brandywine, Maryland, and

ELMER STOKES
600 Baltimore Road
Rockville, Maryland,

Defendants.

[JURY ACTION]

COMPLAINT FOR DAMAGES FOR NEGLIGENCE

1. Jurisdiction over the above-entitled cause is conferred upon this Court by the provisions of Sections 305 and 306, Title 11, D.C. Code, 1951 Edition.

2. The plaintiff is the owner of real estate situated in the District of Columbia, described as Lot 807 in Square 86, improved by premises 1917 I Street, N.W.; that prior to the arising of the cause of action complained of herein, the said premises were in a good and tenantable condition for renting as office space and said premises had been rented to tenants for use as office space for a period of several years past.

3. The defendants, Walter S. Charron and Marie L. Charron, are the owners of the adjoining lot to the west of plaintiff's lot as aforesaid, described as Lot 29 in Square 86; that prior to May, 1959, said lot was improved by premises known as 1919 I Street, N.W.

4. The Surveyor of the District of Columbia has ascertained and certified that a party wall occupies the land along the west line of plaintiff's lot and the east line of Lot 29 owned by the defendants, Walter S. Charron and Marie L. Charron.

5. In May, 1959, the defendants, Walter S. Charron and Marie L. Charron razed the building then located on said Lot 29, following which the said defendants, through their agents and employees, namely, Edmund W. Dreyfuss, Architect, and Nicholas C. Mandragos, Engineer, filed plans and specifications with the District of Columbia Government for the construction of a new building to be erected on said lot, using the aforesaid party wall as the east wall thereof. That upon issuance of the permit by the District of Columbia Government for the construction of said building, the defendant owners of Lot 29, their agents and employees, including the Architect and Engineer aforesaid, and the defendants, Michael M. Abrams, Contractor, and Elmer Stokes, Excavator, commenced construction operations with reference to said new building.

6. That on or about July 27, 1959, the defendants wantonly and negligently caused excavations to be made on said Lot 29 considerably below the bottom level of said party wall, and further, the said defendants wantonly and negligently caused other excavations and holes to be dug at numerous places directly under the party wall and on plaintiff's property, all of which was done without her knowledge and consent; that also, the said defendants wantonly and negligently failed to provide

adequate underpinning, support, lateral bracing, shoring and protection for the said party wall and for plaintiff's building and adjoining land, all of which wanton and negligent acts and omissions of the defendants were in violation of the Building Code of the District of Columbia then in force and effect.

7. The defendants were required to notify the Director, Department of Licenses and Inspection of the District of Columbia Government, concerning the underpinning for said party wall and to obtain approval as to the manner of doing such work, but the said defendants wantonly and negligently failed to do so, all in violation of the provisions of the aforesaid Building Code of the District of Columbia then in force and effect.

8. That the defendant owners of said Lot 29, and the defendants, Edmund W. Dreyfuss, Architect and Nicholas C. Mandragos, Engineer, having provided in the said plans and specifications for the new building that the aforesaid party wall was to be used as the east wall thereof, were further negligent in failing to investigate the thickness and the existing condition of said party wall and of the need for support thereof, and in failing to provide in said plans and specifications for the adequate support of said party wall, and in supervising or in failing to supervise the excavation and construction of said new building, all in violation of their duty to protect the rights and property of the plaintiff.

9. That as a result of the acts and things herein alleged, plaintiff's building and property have been severely and permanently damaged, and the said building and property cannot be restored to their previous condition. As a further result, the plaintiff's property has been rendered untenable, and, on or about July 28, 1959, the District of Columbia Government ordered the plaintiff's tenant, who occupied the entire building, to vacate the same. Thereafter on July 31, 1959, the said tenant notified plaintiff in writing that because of the untenable condition existing in said building that it was being vacated and that rent would not thereafter be paid, effective August 1, 1959.

10. That because of the acts and things herein alleged the plaintiff's building and property have been permanently damaged, by reason of the

loss and destruction to her building, and in the lessening of the usefulness and value of said building, and plaintiff is now being and will continue to be deprived of the rents therefrom over a long period of time, all of which has damaged plaintiff in the sum of \$75,000.00.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of \$75,000.00, besides interest and costs.

/s/ Clarence G. Pechacek
/s/ Joseph A. Rafferty, Jr.
* * *
Attorneys for Plaintiff

Plaintiff demands a jury trial.

/s/ Clarence G. Pechacek

[Filed Sep. 14, 1959]

ANSWER OF EDMUND W. DREYFUSS

First Defense

The Complaint herein fails to state a cause of action against this defendant upon which relief may be granted.

Second Defense

1. The defendant, Edmund W. Dreyfuss, admits the jurisdictional allegations contained in Paragraph 1.
2. This defendant neither admits nor denies the allegations contained in Paragraph 2, since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.
3. This defendant neither admits nor denies the allegations contained in Paragraph 3 of the Complaint, since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

However, this defendant is informed and does believe that the defendants, Walter S. Charron and Marie L. Charron, were the owners of

the real estate, more particularly described in Paragraph 3.

4. This defendant neither admits nor denies the allegations contained in Paragraph 4, since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

5. This defendant admits those allegations contained in Paragraph 5 of the Complaint which are directed specifically at him.

6, 7 and 8. This defendant denies the allegations contained in Paragraphs 6, 7 and 8 which are directed at him.

9 and 10. This defendant neither admits nor denies those allegations contained in Paragraphs 9 and 10 of the Complaint, pertaining to damages, since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

WHEREFORE, the defendant, Edmund Dreyfuss, having fully answered the Complaint, prays that the same be dismissed with costs against the plaintiffs.

MACLEAY, LYNCH & MACDONALD

By /s/ Hugh Lynch, Jr.

/s/ Charles E. Channing, Jr.
Attorneys for Defendant Dreyfuss

* * *

[Certificate of Service]

[Filed Sep. 29, 1959]

**ANSWER FOR DEFENDANT
MICHAEL M. ABRAMS**

Comes now the defendant, MICHAEL M. ABRAMS, and for answer to the complaint herein, respectfully states as follows:

1. Defendant admits the allegations contained in paragraph 1. of the complaint.

2. Defendant is without information as to the allegations contained in paragraph 2., and demands strict proof thereof.

3. Defendant admits the allegations contained in paragraph 3.

4. Defendant is without information as to the allegations contained in paragraph 4., and demands strict proof thereof.

5. Defendant denies that he is an agent or employee of the defendants named in paragraph 5., and avers the facts to be that the contract between the owner of the premises and Lesmark, Inc., is the only contract providing for the construction of said premises. Defendant is without information as to the other allegations contained in said paragraph 5., and demands strict proof thereof.

6., 7. Defendant denies the allegations contained in paragraphs 6. and 7.

8. Defendant is without information as to the allegations contained in paragraph 8., and demands strict proof thereof.

9. Defendant denies the allegations contained in paragraph 9.

10. Defendant denies the allegations contained in paragraph 10.

WHEREFORE, the premises considered, defendant, MICHAEL M. ABRAMS, demands that the complaint be dismissed as against him, with costs to be assessed against the plaintiff.

/s/ Samuel Barker
Attorney for Defendant Michael M.
Abrams
* * *

[Certificate of Mailing]

[Filed Nov. 25, 1959]

ORDER

It appearing that by Order of this Court, dated November 10, 1959, filed herein, Lesmarck, Inc., was made a party defendant in this cause, and the parties hereto, desiring that the defendant, Lesmarck, Inc., be substituted as the Contractor in place of Michael M. Abrams, originally named as the Contractor in the Complaint filed in this cause, and it

appearing, also, that the attorneys for the plaintiff, and for the defendants, Lesmarck, Inc. and Michael M. Abrams, have indicated their consents hereon, it is by the Court on this 25th day of November, 1959,

ORDERED, That the defendant, Lesmarck, Inc., be and it is hereby substituted as the Contractor, in the place of Michael M. Abrams, wherever the term, Contractor, or the name Michael M. Abrams is stated in the Complaint; and it is

FURTHER ORDERED, That the Complaint be and the same is hereby dismissed, without prejudice, as to the defendant, Michael M. Abrams.

/s/ Richmond B. Keech
Judge

Consent:

/s/ Samuel Barker, Attorney for
defendants, Lesmarck, Inc.,
and Michael M. Abrams

/s/ Clarence G. Pechacek

/s/ Joseph A. Rafferty, Jr.
Attorneys for Plaintiff

[Filed Dec. 29, 1959]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISABEL C. FENTON,
Plaintiff

v.

WALTER S. CHARRON
Also known as Walter S. Sharon
and
MARIE L. CHARRON
and
LESMARK, INC., a corporation
EDMUND W. DREYFUSS
NICHOLAS C. MANDRAGOS
ELMER STOKES,

Defendants.)

Civil Action No. 2364-59

ANSWER OF DEFENDANTS, WALTER S. CHARRON AND
MARIE L. CHARRON TO AMENDED COMPLAINT AND
CROSS-CLAIMS OF DEFENDANTS WALTER S. CHARRON
AND MARIE L. CHARRON, AGAINST DEFENDANTS,
LESMARK, INC., A CORPORATION, AND EDMUND W.
DREYFUSS

First Defense

The amended complaint fails to state claims against defendants, Walter S. Charron and Marie L. Charron, upon which relief can be granted.

Second Defense

These defendants admit the allegations of paragraphs 1 and 3; aver they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2; aver that a party wall occupies land along the west line of Lot 807 in Square 86 and the east line of Lot 29 in Square 86, and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 4; aver they entered into an independent contract for the razing of their building on Lot 29 during May, 1959, deny defendants Nicholas C. Mandragos, Elmer Stokes and Edmund W. Dreyfuss were or are their agents or employees, aver they had an independent contract with defendant Edmund W. Dreyfuss, Architect, who prepared and filed the plans and specifications, obtained the necessary permits, and negotiated for all contracts these defendants entered into regarding the razing of the former building, and construction of a new building on their lot, deny that defendant Lesmark, Inc. was or is their agent or employee and aver they had an independent contract with defendant Lesmark, Inc. for construction of a new building on their aforesaid lot, admit that thereafter Lesmark, Inc. commenced construction and operations on the new building, all in answer to the allegations of paragraph 5; deny the allegations of paragraph 6 as to them; aver they are without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 7 regarding notification to the Director, Department of Licenses and Inspection of the District of Columbia concerning underpinning for said party wall and approval thereof and deny the remaining

allegations of this paragraph regarding these defendants wantonly and negligently failing to do or doing anything or in anyway violating the provisions of the Building Code for the District of Columbia; deny the allegations of paragraph 8 as to them; deny the allegation of paragraph 9 regarding plaintiff's building and property having been severely and permanently damaged and cannot be restored, as a result of any negligence, acts or things on the part of these defendants and aver they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph; deny that because of any negligence, acts and things on the part of these defendants plaintiff's building and property has been permanently damaged by reason of loss and destruction to her building and in lessening the useful and rental value of same as alleged in paragraph 10 and aver they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph; and deny each and every other allegation of the complaint not hereinbefore specifically answered.

**CROSS-CLAIM OF DEFENDANTS WALTER S. CHARRON
AND MARIE L. CHARRON AGAINST DEFENDANT
LESMARK, INC., A CORPORATION**

1. On July 17, 1959 Walter S. Charron and Marie L. Charron, defendants herein, entered into a contract with defendant Lesmark, Inc., a corporation, whereunder that defendant obligated itself as general contractor to construct a new building on defendants' Lot 29, Square 86, District of Columbia.

2. By virtue of aforesaid contract, and the relations thereby created between these defendants and defendant Lesmark, Inc., a corporation, these defendants claim indemnity from defendant Lesmark, Inc., a corporation, for any and all sums of any judgment rendered herein in favor of the plaintiff against these defendants, plus costs, and attorneys fees incident to their defense in this action.

WHEREFORE, defendants Walter S. Charron and Marie L. Charron demand judgment against defendant Lesmark, Inc., a corporation, for any and all sums of any judgment rendered herein in favor of the plaintiff

against them, plus costs, and their reasonable attorneys fees in this cause.

**CROSS-CLAIM OF DEFENDANTS WALTER S.
CHARRON AND MARIE L. CHARRON AGAINST
DEFENDANT EDMUND W. DREYFUSS**

1. Defendants Walter S. Charron and Marie L. Charron aver they entered into a contract with defendant Edmund W. Dreyfuss, Architect, whereunder he became obligated among other things to prepare plans and specifications and to supervise all work incident to the razing of their former building on Lot 29, Square 86, District of Columbia and the constructing of a new building thereon.

2. By virtue of aforesaid contract, and the relations thereby created between these defendants and defendant Edmund W. Dreyfuss these defendants claim indemnity from defendant Edmund W. Dreyfuss for any and all sums of any judgment rendered herein in favor of the plaintiff against these defendants, plus costs, and attorneys fees incident to their defense in this action.

WHEREFORE, defendants Walter S. Charron and Marie L. Charron demand judgment against defendant Edmund W. Dreyfuss, for any and all sums of any judgment rendered herein in favor of the plaintiff against them, plus costs, and their reasonable attorneys fees in this cause.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

* * *
Attorneys for Defendants Walter S.
Charron and Marie L. Charron

[Certificate of Service]

[Filed Jan. 25, 1960]

**ANSWER OF DEFENDANT LESMARK INC. TO
AMENDED COMPLAINT AND ANSWER TO CROSS-
CLAIM OF DEFENDANTS WALTER S. CHARRON
AND MARIE L. CHARRON**

First Defense

The amended complaint fails to state a claim against the defendant LESMARK INC. upon which relief can be granted.

Second Defense

1. Defendant LESMARK INC. admits the allegations of paragraph 1.
2. Defendant LESMARK INC. is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 2.
3. Defendant LESMARK INC. admits the allegations of paragraph 3.
4. Defendant LESMARK INC. is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 4.
5. Defendant LESMARK INC. admits the allegations contained in paragraph 5 insofar as they relate to this defendant; it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 5.
- 6, 7. Defendant LESMARK INC. denies the allegations of paragraphs 6 and 7 as they relate to this defendant.
8. Defendant LESMARK INC. is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 8.
- 9, 10. Defendant LESMARK INC. denies the allegations contained in paragraphs 9 and 10.

**ANSWER TO CROSS-CLAIM OF DEFENDANTS
WALTER S. CHARRON AND MARIE L. CHARRON
AGAINST DEFENDANT LESMARK INC.**

First Defense

The cross-claim does not state a claim against this defendant upon which relief can be granted.

Second Defense

1. Defendant LESMARK INC. admits the allegations contained in paragraph 1.

2. Defendant LESMARK INC. denies the allegations contained in paragraph 2 and avers that it has complied with all of the requirements of the aforesaid contract.

WHEREFORE, Defendant LESMARK INC. demands that the cross-claim be dismissed.

/s/ Samuel Barker
Attorney for Defendant LESMARK INC.
* * *

[Certificate of Mailing]

[Filed Jan. 28, 1961]

ANSWER OF EDMUND W. DREYFUSS
TO CROSS-CLAIM OF DEFENDANTS
MARIE L. AND WALTER S. CHARRON

The defendant, Edmund W. Dreyfuss, denies the allegations set forth in the Cross-Claim of Walter S. Charron and Marie L. Charron.

MACLEAY, LYNCH & MACDONALD

By /s/ C. E. Channing, Jr.
Attorneys for Defendant Dreyfuss
* * *

[Certificate of Mailing]

[Filed Dec. 11, 1959]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT ASH

1921 Eye Street, N.W.
Washington, D. C.

Plaintiff

v.

Civil Action No. 3506-59

WALTER S. CHARRON

Also known as Walter S. Sharon
2920 Pennsylvania Ave., S.E.
Washington, D. C.

MARIE L. CHARRON

2920 Pennsylvania Ave., S.E.
Washington, D. C.

Lesmark, Inc., A Corporation
1360 Peabody Street, N.W.
Washington, D. C.

and

EDMUND W. DREYFUSS

1019 Fifteenth Street, N.W.
Washington, D.C.

Defendants

COMPLAINT FOR INJUNCTION AND DAMAGES

1. Jurisdiction over the above-entitled cause is conferred upon this Court by the provisions of Section 305 and 306, Title 11, D. C. Code 1951 Edition.

2. The plaintiff is the owner of real estate situated in the District of Columbia, described as Lot 30 in Square 86, improved by premises 1921 Eye Street, N.W.; that prior to the arising of this cause of action complained of herein, the said premises were in a good and tenantable condition for use as office space and said premises have been used by the plaintiff for such purpose for a period of several years past.

3. The defendants, Walter S. Charron and Marie L. Charron are owners of the adjoining lot to the east of plaintiff's lot as aforesaid

described as Lot 29 in Square 86; that prior to May, 1959 said lot was improved by premises known as 1919 Eye Street, N.W.

4. The Surveyor of the District of Columbia has ascertained and certified that the party wall occupies the land along the east line of plaintiff's lot and the west line of said Lot 29 which is owned by the defendants, Walter S. Charron and Marie L. Charron.

5. In May, 1959 the defendants, Walter S. Charron and Marie L. Charron razed the building then located on said Lot 29, following which the said defendants through their agents and employees, namely, Edmund W. Dreyfuss, Architect, filed plans and specifications with the District of Columbia Government for the construction of a new building to be erected on said lot, using the aforesaid party wall as the west wall thereof. That upon issuance of the permit by the District of Columbia Government for the construction of said building, the defendant owners of Lot 29, their agents and employees, including the Architect as aforesaid, and the defendant, Lesmark, Inc., Contractor, commenced construction operations with reference to said new building.

[6]. That on or about July 27, 1959 the defendants wantonly and negligently caused excavations to be made on said Lot 29 considerably below the bottom level of said party wall, and further, the said defendants wantonly and negligently caused other excavations and holes to be dug at numerous places directly under the party wall and on plaintiff's property, all of which was done without his knowledge and consent; that also the said defendants wantonly and negligently failed to provide adequate underpinning, support, lateral bracing, shoring and protection for the said party wall and for plaintiff's building and adjoining land, all of which wanton and negligent acts and omissions of the defendants were in violation of the Building Code of the District of Columbia then in force and effect.

7. The defendants were required to notify the Director, Department of Licenses and Inspection of the District of Columbia Government concerning the underpinning for said party wall and to obtain approval as to the manner of doing such work, but the said defendants wantonly

and negligently failed to do so, all in violation of the provisions of the aforesaid Building Code of the District of Columbia then in force and effect.

8. That as a result of the acts and things herein alleged, plaintiff's building and property have been severely and permanently damaged, which said damage is in the sum of \$12,000.00.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of \$12,000.00 besides interest and costs.

/s/ Clarence G. Pechacek

/s/ Joseph A. Rafferty, Jr.
Attorneys for Plaintiff

* * *

Plaintiff demands a jury trial.

/s/ Clarence G. Pechacek

[Filed Dec. 29, 1959]

ANSWER OF DEFENDANTS WALTER S. CHARRON AND MARIE L. CHARRON TO COMPLAINT AND CROSS-CLAIMS OF DEFENDANTS WALTER S. CHARRON AND MARIE L. CHARRON AGAINST DEFENDANTS LESMARK, INC., A CORPORATION AND EDMUND W. DREYFUSS

First Defense

The complaint fails to state claims against defendants Walter S. Charron and Marie L. Charron upon which relief can be granted.

Second Defense

These defendants admit the allegations of paragraphs 1 and 3; aver they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2; deny the allegations of paragraph 4; aver they entered into an independent contract for the razing of their building on Lot 29 during May, 1959, deny defendant Edmund W. Dreyfuss was or is their agent or employee and aver they had an

independent contract with defendant Edmund W. Dreyfuss, Architect, who prepared and filed the plans and specifications, obtained the necessary permits, and negotiated for all contracts these defendants entered into regarding the razing of the former building and construction of a new building on their lot, deny that defendant Lesmark, Inc. was or is their agent or employee and aver they had an independent contract with defendant Lesmark, Inc., for construction of a new building on their aforesaid lot, admit that thereafter Lesmark, Inc., commenced construction and operations on the new building, all in answer to the allegations of paragraph 5; deny the allegations of paragraph 6 as to them; aver they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 regarding notification to the Director, Department of Licenses and Inspection of the District of Columbia, concerning underpinning for said party wall and approval thereof and deny the remaining allegations of this paragraph regarding these defendants wantonly and negligently failing to do or doing anything or in anyway violating the provisions of the Building Code for the District of Columbia; deny the allegations of paragraph 8 as to them; and deny each and every other allegation of the complaint not hereinbefore specifically answered.

**CROSS-CLAIM OF DEFENDANTS WALTER S.
CHARRON AND MARIE L. CHARRON AGAINST
DEFENDANT LESMARK, INC., A CORPORATION**

1. On July 17, 1959 defendants Walter S. Charron and Marie L. Charron entered into a contract with defendant Lesmark, Inc., a corporation, whereunder that defendant obligated itself as general contractor to construct a new building on defendants' Lot 29, Square 86, District of Columbia.

2. By virtue of aforesaid contract, and the relations thereby created between these defendants and defendant Lesmark, Inc., a corporation, these defendants claim indemnity from defendant Lesmark, Inc., a corporation, for any and all sums of any judgment rendered herein in favor of the plaintiff against these defendants, plus

costs, and attorneys fees incident to their defense in this action.

WHEREFORE, defendants Walter S. Charron and Marie L. Charron demand judgment against defendant Lesmark, Inc., a corporation, for any and all sums of any judgment rendered herein in favor of the plaintiff against them, plus costs, and their reasonable attorneys fees in this cause.

**CROSS-CLAIM OF DEFENDANTS WALTER S.
CHARRON AND MARIE L. CHARRON AGAINST
DEFENDANT EDMUND W. DREYFUSS**

1. Defendants Walter S. Charron and Marie L. Charron aver they entered into a contract with defendant Edmund W. Dreyfuss, Architect, whereunder he became obligated among other things to prepare plans and specifications and to supervise all work incident to the razing of their former building on Lot 29, Square 86, District of Columbia and the constructing of a new building thereon.

2. By virtue of aforesaid contract, and the relations thereby created between these defendants and defendant Edmund W. Dreyfuss these defendants claim indemnity from defendant Edmund W. Dreyfuss for any and all sums of any judgment rendered herein in favor of the plaintiff against these defendants, plus costs, and attorneys fees incident to their defense in this action.

WHEREFORE, defendants Walter S. Charron and Marie L. Charron demand judgment against defendant Edmund W. Dreyfuss, for any and all sums of any judgment rendered herein in favor of the plaintiff against them, plus costs, and their reasonable attorneys fees in this cause.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

* * *
Attorneys for Defendants Walter S.
Charron and Marie L. Charron

[Certificate of Service]

[Filed Jan. 11, 1960]

ANSWER OF EDMUND W. DREYFUSS

First Defense

The Complaint herein fails to state a cause of action against this defendant upon which relief may be granted.

Second Defense

1. This defendant admits the jurisdictional allegations contained in Paragraph 1 of the Complaint.

2. This defendant neither admits nor denies the allegations contained in Paragraph 2 of the Complaint, since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

3. The allegations contained in Paragraph 3 of the Complaint are not directed at this defendant, and this defendant is not required to answer said allegations.

4. This defendant neither admits nor denies the allegations contained in Paragraph 4 of the Complaint since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

5. This defendant admits the allegations contained in Paragraph 5 of the Complaint.

6. This defendant denies the allegations contained in Paragraph 6 of the Complaint. (Evidently Paragraph 6 was not numbered or designated as such in the Complaint. In this Answer this defendant refers to Paragraph 6 as that paragraph appearing between Paragraph 5 and Paragraph 7 in the Complaint.)

7, 8. This defendant denies all allegations contained in Paragraphs 7 and 8 of the Complaint.

WHEREFORE, the defendant, Edmund W. Dreyfuss, having fully answered the Complaint, prays that the same be dismissed, with costs against the plaintiff.

MACLEAY, LYNCH & MACDONALD

By /s/ Hugh Lynch, Jr.
Attorneys for Defendant Dreyfuss

* * *

[Certificate of Service]

[Filed Jan. 25, 1960]

ANSWER AND COUNTERCLAIM OF
LESMARK, INC.

First Defense

The complaint fails to state a claim against this defendant upon which relief may be granted.

Second Defense

1. Jurisdiction is admitted.

2, 3, 4. Defendant LESMARK, INC., is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 2, 3, and 4.

5. This defendant admits the allegations contained in paragraph 5.

6, 7, 8. This defendant denies the allegations of paragraph 6, 7 and 8 insofar as they relate to it.

WHEREFORE, defendant LESMARK, INC., demands that the complaint be dismissed with costs against the plaintiff.

/s/ Samuel Barker
Attorney for Defendant LESMARK, INC.

* * *

[Filed Jan. 25, 1960]

COUNTERCLAIM

By way of counterclaim defendant LESMARK, INC., claims damages and counsel fees in the sum total of TWENTY-FIVE HUNDRED DOLLARS (\$2500.00) against the plaintiff herein for and on account of the wrongful issuance of a restraining order against this defendant, causing damage and delay in defendant's performance of its contract to construct the premises at 1919 Eye Street, N.W.

/s/ Samuel Barker
Attorney for Defendant LESMARK, INC.

[Certificate of Mailing]

[Filed Jan. 28, 1960]

ANSWER OF EDMUND W. DREYFUSS
TO CROSS-CLAIM OF WALTER S. AND
MARIE L. CHARRON, DEFENDANTS

The defendant, Edmund W. Dreyfuss, denies the allegations set forth in the Cross-Claims of Walter S. Charron and Marie L. Charron.

MACLEAY, LYNCH & MACDONALD

/s/ Charles E. Channing, Jr.
Attorneys for Defendant Dreyfuss

* * *

[Certificate of Mailing]

[Filed Feb. 13, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENTON, Isabel C.)

Plaintiff)

v.)

Civil Action No. 2364-59

CHARRON, Walter S., Marie L.)
Charron, Lesmark, Inc. and)
Edmund W. Dreyfuss)

Defendants)

AND

ASH, Robert)

Plaintiff)

v.)

Civil Action No. 3506-59

CHARRON, Walter S., Marie L.)
Charron, Lesmark, Inc. and)
Edmund W. Dreyfuss)

Defendants)

CONSOLIDATED CASES

PRETRIAL PROCEEDINGS

NEGLIGENCE FOR PROPERTY DAMAGE

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

P owned a building at 1917 Eye St., N.W., being Lot 807, Square 86. Since the filing of this action, P has remarried and her name is now Isabel C. Pryce; Walter S. Charron and Marie L. Charron, husband and wife, owned the adjacent property at 1919 Eye St., N.W., being Lot 29 in Square 86; Lesmark, Inc., a corporation, is a building contractor, who contracted with Ds Walter S. Charron and Marie L. Charron for construction of new building at 1919 Eye St., N.W.; Edmund W. Dreyfuss, an architect entered into an oral agreement with Ds, Walter S. Charron and Marie L. Charron for preparation of plans, specifications and supervisory services for erection of new building on Lot 29 at 1919 Eye St., N.W.

In Action No. 2364-59, Nicholas C. Mandragos, engineer, and Elmer Stokes, excavator, both residents of the State of Maryland, were originally named party Ds, but this action was dismissed without prejudice as to them, since personal service upon them could not be obtained in this cause. However, Mandragos and Stokes were not sued in 3506-59.

In both actions, third party proceedings involving two additional parties were undertaken, but by Order of Court a severance as to these proceedings was granted pending trial of this action (2364-59).

P Robert Ash owned a building at 1921 Eye St., N.W., described as Lot 30, Square 86. The Charron property was situated between the property of Fenton and of Ash.

PLAINTIFFS CLAIM that prior to July 27, 1959, the building of Fenton was in good and tentable condition and was then being rented to M. Belmont Ver Standig, Inc. on a monthly rental basis of \$805.00.

Prior to said date, P Ash occupied his property personally for use as offices. A party wall occupies the land along the west line of P Fenton's lot and east line of Lot 29. A party wall occupied the land along the east line of P Ash's property and the west line of the D Charron's property.

On the date indicated, the Ds, owners of 1919 Eye St. and their agents, started work on the construction of the new building on said property and in so doing they negligently caused excavations to be made on Lot 29 considerably below the bottom level of the party walls; negligently caused other excavations and holes to be done at numerous places directly under the party walls and on Ps' property, all of which was done with Ps' knowledge and consent; Ds negligently failed to provide adequate under-pinning, support, lateral bracing and shoring and protection for said party walls and for Ps' building and adjoining land; Ds negligently failed to give required notice to the Director, Dept. of Licenses & Inspection of the DC Government concerning the under-pinning for said party walls and failed to obtain approval as to the manner of doing such

work; the D Dreyfuss, having provided in the plans and specifications for the new building, that the party walls were to be used as the west wall of Fenton's property and east wall of Ash's property, was negligent in failing to investigate and ascertain the thickness and existing condition of the party walls and of the need for supporting same while construction work was under way at 1919 Eye St.; and was further negligent in failing to provide in the plans and specifications for adequate support of said party walls and in failing to adequately supervise the excavation and construction of the new building, all of which negligence was in violation of the Defendants' duty to protect the rights and property of the Plaintiffs, and all of which negligent acts violated the following sections of the Building Code of the District of Columbia: Sec. 307, protection of excavations; Sec. 208, Protection and Restoration of Adjoining Property; Article 804, - 27 - Party walls.

DEFENDANTS CHARRON deny any negligence which in any way contributed to the proximate cause of any of the alleged damages to the building of the Ps on the adjacent lots and assert that if any such damages alleged were proximately caused by any faulty design or plans or specifications for the new building, such damage was proximately caused by the sole negligence of or violations of building regulations by the independent contractor, D Dreyfuss. Further asserts that if any of the damage alleged resulted from the faulty manner of carrying out the actual work of construction, all such damage was proximately caused by the sole negligence or violations of building regs of the independent contractor, Lesmark, Inc.; deny the violation of any DC Building Regulation.

IN SUPPORT OF THEIR CROSS CLAIMS AGAINST DS DREYFUSS AND LESMARK, these Ds assert they entered into an oral contract with D Dreyfuss, and on July 17, 1959, into a written contract with D Lesmark, by virtue of which contract and the contractual relationship created thereby, these Ds claim indemnity from said Ds Dreyfuss and/or Lesmark, Inc.

for any and all sums recovered herein by the Ps against these Ds, together with costs and attorneys' fees incident to the defense of these actions by these Defendants. These DS deny any liability under the cross claims filed against them.

DEFENDANT DREYFUSS asserts that in connection with the preparation of the plans and specifications involved herein, an independent structural engineer, Mandragos, was engaged to perform the necessary work and to prepare the structural plans; denies any negligence or violations of DC Building Code; asserts that the damages, if any, were caused by D Lesmark, Inc., acting thru its agents, servants or employees, asserting the specific acts of negligence and violations of DC Building Code alleged by the P against Lesmark; denies the nature and extent of Ps' damages.

This D cross claims against D Lesmark, Inc., seeking to recover the amount of any damages awarded the Ps against him, asserting the negligence of and violations of DC Building Regulations claimed by the Ps.

Said D also denies any responsibility to Ds Charron and Lesmark under their cross claim.

DEFENDANT LESMARK denies any negligence or violations of building regulations; asserts that damages, if any, sustained by the Ps, were caused either by the Ds Charron, the D Dreyfuss, or by Mandragos or by one Stokes who was charged with and required to perform the excavation necessary in connection with the construction; Dreyfuss prepared the plans and specifications which were complied with by this D; Mandragos was the engineer employed by the other Ds; asserts that it corrected or repaired all damages to the properties of the Ps which have been attributed to the construction involved.

IN SUPPORT OF ITS THIRD PARTY CLAIM, this D seeks a judgment against Harris & Ogus, Inc. and the Hartford Accident Indemnity Co. However, this action has been temporarily severed and is not now material and relevant.

The Plaintiff Fenton, now Pryce, claims the damages set out in the statement which is attached hereto, made a part hereof and incorporated herein by reference marked "A".

THE PLAINTIFF ASH claims the following damages:

Plastering and Structural Repairs, \$3,002.13; decorating, \$2,155.82; Engineering, \$328.26; Attorneys' fees to Plaintiff's Attorneys of record incident to obtaining temporary Restraining Order and to otherwise compel structural repairs to premises, \$1,000.00.

STIPULATIONS

P Ash agrees that on or before April 9, 1962, he will furnish a written, itemized statement of his claimed damages, which, if filed, will supercede the claimed damages herein, to the counsel for the Ds and the Clerk of Court.

Ps' counsel request Ds to stipulate that an 8 inch party wall, occupies the land, along the west line of Ps' lot 807 and the east line of Lot 29. P also requests Ds to stipulate that a party wall occupies the land along east line of Lot 30 and the west line of Lot 29. Ds will not stipulate to either of these requests.

It is agreed that a contract, copy of which is marked and initialled by Examiner, will be produced at the trial and may be introduced in evidence.

The following may be admitted without formal proof subject to objections as to materiality and relevancy: Provisions of the Building Code for the D of C listed herein; letters and photographs, initialled by Examiner, provided counsel for the Ps make them available for examination and copying, if desired by Ds, photographs, if initialled by all counsel; document marked D-1, initialled by Examiner.

Counsel for the Ps agrees to furnish to counsel for Ds a written statement to be furnished by Ds, on or before April 9, 1962, which will

enable Ds to obtain copies of the Federal income tax returns for the years 1957 to date with particular reference to the buildings in question.

The parties agree to the mutual exchange in writing on or before April 9, 1962, of the name(s) and address(es) of witnesses to be used at the trial, filing a copy thereof on or before said date with the Clerk of the Court.

The plans and specifications, initialled by Examiner, may be admitted in evidence. Counsel for the parties may examine said plans between date of pretrial and trial.

TRIAL COUNSEL: C.G. Pechacek, Esq. for the Plaintiff; S. Barker, Esq. for the D Lesmark; Charles E. Channing, Jr., Esq. for D Dreyfuss; Justin Edgerton, Esq. for DS Charrons.

The Examiner has requested counsel for Ds to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

/s/ Clarence G. Pechacek	Counsel for Plaintiffs
/s/ Samuel Barker	Counsel for Deft. Lesmark
/s/ C. E. Channing, Jr.	Counsel for Deft. Dreyfuss
/s/ Justin L. Edgerton	Counsel for Charrons
/s/ John J. Finn PRETRIAL EXAMINER	

"A" [Attached to Pretrial Proceedings]

Resulting Damages:

(1) Plaintiff's building was rendered untenable on July 28, 1959. On that date the tenant vacated plaintiff's building upon request made by the Department of Licenses and Inspection of the District of Columbia Government. On July 31, 1959, the tenant notified plaintiff in writing that it was permanently vacating the building because of the untenable condition.

(2) Plaintiff's building was severely and permanently damaged and its usefulness and value were thereby diminished. The sinking of the west wall (party wall) caused the floors to become out of level and to slant to the southwest. There were serious exterior cracks in the stone and brickwork on the south face and in the southwest corner of the west wall. In the interior of the building, there were numerous cracks caused in the walls, both horizontal and vertical, and in the ceiling, in many of the rooms on the first, second, third and fourth floors.

(3) The elevator equipment was damaged and required repair.

(4) By reason of the defendants' refusal to take action to protect plaintiff's building and property as directed by the Department of Licenses and Inspection of the District of Columbia Government, and as required by the Building Code provisions, the plaintiff filed in this cause a Motion for Preliminary and Permanent Injunction to obtain such action. Pursuant thereto, on September 9, 1959, this Court issued an Order to show Cause and a Temporary Restraining Order forbidding further construction by defendants on the new building on Lot 29, pending hearing on the Motion for Preliminary Injunction. By consent of the parties, orders were signed by the Court continuing said hearing from time to time, to October 30, 1959. During the period while the restraining order was in effect, Lesmark, Inc. proceeded with Structural and other repairs to plaintiff's building although this work was not completed for a period of several months following July 28, 1959, the date on which the building was rendered untenable.

(5) Other work that had to be done to place plaintiff's building in a tenantable condition was undertaken by the plaintiff, as soon as the basic structural work and plastering were completed by Lesmark, Inc. The interior painting was completed by January 30, 1960, and the flooring work was completed by February 15, 1960. The painting of the exterior of the building was completed by February 15, 1960.

(6) In an effort to minimize damages by securing a new tenant as soon as possible, the plaintiff listed the property for rent with the Thomas J. Fisher Company on December 7, 1959. Later, on May 11, 1960, the

property was listed for sale through this same agency and also thereafter, was listed for sale with other real estate agents. The property was vacant from the date of the said occurrence on July 28, 1959, to the date of sale of the building by plaintiff on December 15, 1960.

Special Damages:

Total damages are in the sum of \$29,801.94, made up of the following items:

- | | |
|--|-----------------------------|
| (1) Loss of rent - Gross rental from August, 1959 to December, 1960 @ \$805.00 per month | \$13,865.00 |
| Less adjustment for reduced costs during this period of building vacancy for heat, utilities, elevator maintenance, janitor and char service | <u>3,888.00</u> \$ 9,977.00 |
| (2) Whiting Elevator Co., Inc. 1110 9th St., N.W., repair and cleaning of elevator, renewal of hoist cables, etc. | 390.00 |
| (3) Electrical Associates, 2021 M St., N.W. removing and replacing electrical fixtures and air conditioning units, checking of light fixtures and wiring | 420.89 |
| (4) Scott Photography, 911 15th St., N.W., photographs | 25.40 |
| (5) Cleaning and cartage of debris, John Phillips, Mayme Phillips and Joseph Waddy | 149.00 |
| (6) Bernard F. Locraft, 1179 New Hampshire Ave., N.W., engineering services, to date | 292.75 |
| Additional services, estimated | 250.00 |
| (7) Edward J. Walsh & Son, 724 14th St., N.W., additional liability insurance | 15.41 |
| (8) John Ligon, Inc., 4918 Bethesda Ave., venetian blind repair | 31.65 |

(9) Wizard Locksmith Co., 2813 14th St.,N.W., replacement of front door closer	\$ 29.78
(10) Adams Renovating Co.,Inc., 1823 M St.,N.W. renovations, repairs and redecorating	3,022.00
(11) Gott's Linoleum, Inc., 4634 No. Washington Blvd., Arlington, Va., cleaning, refinishing and installation of flooring	548.75
(12) Union Trust Co., 15th & H St.,N.W., interest paid on loan obtained to finance foregoing repairs	649.31
(13) Portion of fees charged by plaintiff's Attorneys of record incident to obtaining Temporary Re- straining Order and to otherwise compel structural repairs to premises	1,500.00
(14) Permanent damage to premises	12,500.00

[Filed Feb. 13, 1962]

**ORDER FOR CONSOLIDATION OF
CASES FOR TRIAL**

It appearing at the pretrial of C.A. 2364-59, Fenton v Charron, et al, that said action involves the same facts, except for damages, and law, which are identical to those involved in Ash v Charron, et al, CA 3506-59, and it appearing that it is desirable to consolidate said cases for trial, it is hereby

ORDERED that said cases be and they hereby are consolidated for trial.

/s/ Matthew F. McGuire
JUDGE

2/13/62

NO OBJECTION:

/s/ Clarence G. Pechacek
/s/ C. E. Channing, Jr.
/s/ Samuel Barker
/s/ Justin L. Edgerton

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D.C.
Thursday, Oct. 25, 1962

The above-entitled matters came on for trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, at 10:00 a.m.

* * * * *

3

ISABEL C. FENTON PRYCE

called as a witness on behalf of the plaintiffs, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

4

Q. Are you the owner of the building at 1917 I Street, N.W.?

A. Yes, I am.

Q. And do you know the lot and square numbers? A. Lot 807, square 86.

Q. Approximately how long a period of time have you owned this building? A. Since 1946.

Q. And after you acquired it, what was the building used for?
A. As an office building.

Q. Would you describe just in a general way the capacity or the size of the building? A. This is a four-story basement building, with a penthouse on the top for the elevator machanism. There are four rooms and two lavatories on each floor, with a long hall connecting them and a stairway in the middle of the building.

The building is of brick and stone.

Q. What had the building been used for? A. During the war, it was used by the OSS.

5

Q. Following that, what use was made of the building? A. When I acquired the building in 1946, the OSS had just vacated it. At that time, I made extensive renovations to turn it into a rentable office building.

Q. Did you do that? A. Yes, I did.

Q. And what was the building used for after these renovations that you spoke of? A. As an office building.

Q. Did that continue up to the time of this occurrence? A. Yes, sir.

Q. And who were the tenants in your building in July of 1959?
A. The Ver Standig Advertising Company.

* * * * *

Q. They occupied the entire building? A. They were the only tenant. They occupied the entire building.

Q. Prior to July 1959, how long had that been the case? A. For
6 a little over two years.

Q. What was the situation before that? A. The Ver Standig people had been the first tenant in the building in 1946. Little by little as vacancies occurred, they took over more space until finally they occupied the entire building.

* * * * *

Q. And when did you next visit the building? A. On the morning of the accident, July 28.

Q. Would you describe what occurred at that time? A. * * *
and I noticed immediately that there was a crack in the building from
7 the roof right straight on down to the foundations.

Q. Now in what part of the building was this crack? A. It was at the front southwest corner.

Q. Did you observe any other cracks on the exterior? A. There were several cracks in the stone facing of the building in the front, just below the windows where the stones had parted and another place where the stone itself had cracked.

* * * * *

Q. Mrs. Pryce, I show you Plaintiffs' Exhibits 1, 2 and 3,
and ask you if you can describe those photographs? A. This is a
8 picture of the front of the building 1917 I Street near the sidewalk level, showing the cracks in the stone facing.

Q. What is that (indicating)? A. The sticker that is on here was put on by the District officials to keep track of any further cracking in the building.

Q. Was that done the morning when you were there? A. Yes, sir, it was.

* * * * *

9 Q. Will you describe Exhibit No. 2, please? A. * * * This shows the crack that comes right down the face of the building.

Q. Now, then, would you describe Photograph No. 3? A. No. 3 is a view of the west wall of the building, showing the excavation going down not as far as the excavation went. This board is on the sidewalk level of the building. This also further shows the crack that comes on down to the base of the building.

* * * * *

11 Q. Now, I show you Plaintiffs' Exhibit 8. Will you describe that, please? A. Exhibit 8 was taken shortly after the first picture and shows that a large piece of stone and masonry had fallen from the edge of the building down into the hole after this piece of board in No. 7 had been put on there. Also, that is another view of the foreman, Mr. Sharp.

Q. Now, what portion of your building would that be? A. This would be the front southwest corner.

Q. Did that portion fall out while you were there that morning? A. Yes, it did.

* * * * *

14 Q. Now, I would like to show you Plaintiffs' Exhibits 9, 10, 11, 12, 13 and 14. Would you take them in sequence and describe what they show? A. Exhibit 9 shows a front view of 1917 I Street with the cross-bracing at 1919 up to about the level of the second floor. This also shows that timbers had been put underneath the bay which starts at the second floor and that some tie bracing had been put through this bay in order to attempt to tie the front of the building back so that it would not come out any further.

Exhibit No. 10 is a view of the southwest corner of the building with more cross-bracing and you can also see some of the tie bracing that went through the bay and the rope that was used to attempt to tie the tie-bracing to the cross-bracing on the side.

* * * * *

17 Q. What happened thereafter in so far as your building is concerned? A. Well, on the advice of my attorneys, I called a civil engineer, Mr. Bernard Locraft, to come and consult with me as to what necessary precautions I should take to preserve my building; and he came on the morning of the 29th of July.

18 Q. Then what happened in so far as the actual work of making your building safe was concerned? A. Nothing was done about it. Mr. Locraft consulted with the District officials and with the construction people, Lesmark, Incorporated, and made concrete suggestions to them and nothing happened. And then on August 8th -- this is a month after the accident had occurred -- I was informed by the District and was also given a copy of the second letter that was sent to the Charrons and to Lesmark, Incorporated, directing them again to comply with their request in their letter of July 29th.

Q. Was there any response in so far as it pertained to repairing or making it safe, do you know? A. No, there was none.

Q. Then what happened? A. Then in order to try to get some work done, we filed suit against the owners and the contractors and others in order to try to get the work done.

Q. After that suit was filed, was there any response in so far as it pertained to your building? A. No, there was not.

Q. Then what happened? A. Then, on the advice of my attorneys, we decided to get an injunction against the owners and the contractors to stop work on 1919 until my building had been put back in a safe

19 condition. * * *

* * * * *

Q. Following the injunction proceeding, was there any work

undertaken on your building? A. Not right away.

Q. Approximately when did it start? A. Approximately the first part of October.

Q. What took place at that time? A. At that time, Lesmark, Incorporated, caused -- they had by this time, of course submitted the necessary plans and they had been approved by the District inspectors in the District Office and the engineering inspector.

Q. When you say "necessary plans," what do you mean by that? A. The two letters had directed them to submit these plans to show how they would restore my building to a safe condition.

* * * * *

24 Q. Now, would you go ahead and explain what other work was done by Lesmark? A. After the bolts had been fastened into the strap plates, of course, they had to take out some more of the plaster that had fallen from the walls in the interior of the building and in the ceilings in order to get to the joists to put the strap plates on and then to weld them on.

Q. When you speak of floor joists, what joists actually do you mean? A. I think it was either the fifth or fourth floor joists back from the front of the building to which these plates were tied.

Q. On what floor? A. On the level between the first and second floors, the second and third floors, and the third and fourth floors.

Q. Now, how did they get access to those? A. How did they get access to the floors?

Q. To the joists. A. They had to knock away the plaster where it had not already fallen away from the ceiling because of the accident.

* * * * *

25 Q. How much of that work was done by Lesmark? Can you describe briefly by rooms and floors? A. Starting at the basement in the front part of the building and the first two rooms in the front part of the building, up through the front floors.

Q. That is on all floors? A. On all floors.

Q. What did Lesmark do in those rooms? A. He repaired the plastering. He first took down the old plastering. I had caused to have removed all the electrical fixtures at the time of the accident because they felt that it might be dangerous to leave them there.

He then went ahead with taking down all the old plastering and he replastered and then he painted the walls.

26 Q. Did he paint the whole building? A. No, he only painted two rooms on each floor in the front of the building.

Q. What about the gas and electricity of the building? A. On the day of the accident, the District officials sent for the elevator inspector to seal off the elevator. When they arrived, I asked them to please turn off the gas and hot water heater and also to pull the master switch on the electricity in the building, which they did.

At a later time, I, on advice, had the electrical fixtures taken out of the front part of the building so that they would not become broken by falling plaster and also had the air-conditioners taken out from the front part of the building.

* * * * *

Q. Approximately what period of time was Lesmark engaged in doing this work on your building? A. From approximately the early
27 part of October until the 15th of December.

* * * * *

30 Q. Mrs. Pryce, now coming to the repairs that you made on your building: Could you describe what the conditions were that had to be repaired and what you did with reference to the repair of these conditions?

* * * * *

A. I began to get bids from contractors.

Q. And what transpired as a result of that? A. After the work of Lesmark, Incorporated, had been completed, I had my people with whom I had already contracted to do the work, move into the building and complete putting the building back in a tenantable condition.

* * * * *

31 Q. Now then, what was the circumstance with reference to the elevator? A. The District Elevator Inspector inspected the elevator and sent me a letter stating that certain repairs had to be made to the elevator before it would be certified for safe use again.

Q. And pursuant to that, what did you do? A. I had my elevator company also consult with the District Elevator Inspector and make their own inspection and at which time, they gave me their estimate of what it would cost to make these repairs that the District requested.

Q. Did you have the repairs made? A. Yes, I did have the repairs made.

* * * * *

36 Q. Mrs. Fenton, [Pryce] what knowledge do you have from your own personal observations concerning the condition of the elevator, the elevator shaft, the elevator cable, at any time following the July 28th occurrence until the elevator was put back in use? A. I was not present at the District inspector's visit to the building but I was present
37 when the Whiting Elevator people were there and they showed me the debris that had collected both in the elevator and at the bottom of the shaft. When the cable which hauls the elevator up and down was taken off, the elevator repairmen showed me where the cable had hung over the large wheels at the top of the shaft --

* * * * *

42 MR. FRIEDMAN: I would object to that on behalf of all defendants on the grounds, Your Honor, that there is no showing and I don't think this witness is competent to show the work done in these statements was necessary as a result of what occurred to the building. I think the best evidence for that is the testimony of the electrical contractor who did this work who might be able to tie it up with the particular instance.

MR. PECHACEK: Your Honor, I think we are going to run into the same situation with most of the bills. In that connection, unless Mr. Channing has also subpoenaed some of these suppliers, we will

either have to do that or if Your Honor would, I would like to have consideration given to a Municipal Court of Appeals case, *Wright v. Capital Transit Company*, 35 Atlantic 2d 183. In that case, it held that where the plaintiff had a paid bill to support her expenditure and that it appeared to be reasonable and that she had made efforts through getting bids and other reasonable means to ascertain what the fair and reasonable charge would be that that bill was prima facie evidence of the item involved.

Possibly if Your Honor would consider that, we could then have a ruling on it after the recess and then we can determine whether it
43 would be necessary for us to subpoena the suppliers or not.

MR. CHANNING: Your Honor, maybe I can be of help here.

First, in the *Wright* case, there was no dispute as to the cause and effect; it was only a dispute in the bill. In that case, there was no dispute, for example, as to whether Capital Transit and *Wright* had an accident and that damage was done. In this particular situation, I only object to the submission of these bills and a description of the work to Your Honor because I don't believe that all of these repairs were caused by this occurrence and I don't believe that there is any proof that this plaintiff can give us in that respect.

I have no objection to the plaintiff testifying that she did pay these people so much money and subject to tying it up to the contractors.

I have subpoenaed all the contractors just to show the Court exactly what the situation was. Everyone of them they are going to mention today, I think, I have subpoenaed. I don't know what they are going to say, but I just want to clarify the situation.

THE COURT: Very well, I would suggest, then, in the interest of moving along in a little faster pace, that you ask the witness whether
44 the items covered by these various bills were all incurred as a result of this accident as it is described. I will admit the bills if the witness answers affirmatively, as I assume she will, and when the suppliers are here, you may then move to strike any bill or any

portion of the bill that you want to strike. I think that will move the matter along.

MR. PECHACEK: May I then lump all of these as one exhibit or does Your Honor prefer to have them marked separately?

THE COURT: I would prefer to hear the individual items in order that I will know what they are.

MR. PECHACEK: Very well, Your Honor.

BY MR. PECHACEK:

Q. Now then, with reference to Plaintiffs' Exhibit 26 for identification, you have indicated that was a bill of what firm?

THE COURT: The Electrical Associates.

BY MR. PECHACEK:

Q. And was that work and the other work that you had done in the way of making repairs, was that work necessary and required to restore your building? A. This work was necessary as a result of the accident to the building.

45 Q. On how many of the repair bills did you seek bids before you actually let the work? A. On the bills for the flooring and on the bills for the redecorating of the building; the other bills were from people who had worked on the building for many years and, therefore, knew it well.

* * * * *

46 THE COURT: I will admit the exhibits assuming your objection as you have stated it and subject to a motion to strike any or all parts.

* * * * *

49 Q. * * * Would you describe those documents, please? A. Plaintiffs' Exhibit 29 is the bill for work done by Adams Renovating Company on the building at 1917 I Street.

* * * * *

50 MR. CHANNING: The same objection goes to this as to the other matters that have been introduced concerning these repairs. With respect to this bill, my objection is it would seem to me almost wholly

for renovating. In other words, there are parts of it such as, Your Honor will see, painting the entire outside of the building and painting the fire escapes and painting hallways and so forth. I am quite willing to go along with Your Honor's ruling that this be admitted for purposes as competent to prove, then we will have Adams decorating people here to tell exactly what was done.

THE COURT: I think the present pending question to the witness is a proper one.

* * * * *

51 [BY MR. PECHACEK:]

Q. Can you just explain the items which represent repair of damage? A. Interior work: paint public hall, first floor, stairway to second floor, second floor hall, stairway to third floor, third floor hall, stairway to fourth floor and fourth floor hall, ceilings, walls and woodwork, one coat; \$375.00.

Q. Now, would you explain why that work was necessary? A. These public halls were dirty from the damage from the debris that had collected from removal of the debris. The walls had been damaged in places. The walls of the stairways had been damaged due to the dust and dirt from the plaster and from the debris removed from the building.

Q. What is the next item that was necessary? A. The next item is painting on the first floor: paint two offices at rear and one small room adjoining, ceilings, sidewalls and woodwork one coat.

52 On the second floor: paint two offices at rear on second floor and one lavatory, one coat; ceilings, sidewalls and woodwork.

On the third floor: paint two offices at rear on third floor and one lavatory, one coat.

On the fourth floor: paint two offices at rear on fourth floor and one lavatory, one coat. \$415.00.

Q. Now, why was that work necessary? A. Some of the debris that had been removed from the front of the building had been taken

to the back and thrown out the back windows down below. Two of these floors had been painted by the tenant just prior to the accident but were so dirty from the building standing vacant and from misuse during the time after the accident that it was necessary to have them painted.

Q. When you speak of misuse, what do you mean by that? A. The fact that the building was empty and the workmen of the contractor, Lesmark, used the building while they were doing repairs in the front part of the building.

* * * * *

54 Q. Now, Mrs. Pryce, what was the next item that was required to repair the damage? A. The next item is to varnish handrail and pickets on public stairway from the first to fourth floors, one coat. This was \$85.00. This was necessary because of the vast amount of debris that was both thrown and taken down the stairway.

Q. What is the next repair item? A. The next repair item is remove six pickets at top of stairway, fourth floor and re-locate on
55 stairway where missing. Fill in empty spaces at top of landing, fourth floor with --

Q. Excuse me. Is this a necessary item? A. Yes, it was. There were some pickets that were missing below and we removed those at the top to put in the pickets that were missing along the bottom part of the stairway and then replaced those pickets at the top. In other words, we tried to make it all look as nicely as possible.

Q. How much was that? A. \$24.

Q. What is the next item of necessary repair? A. Paint exterior brick, wood and metal work on front of building, two coats; paint exterior woodwork and metal at rear and on one side, one coat. Paint metal fire escape, one coat; \$876.00.

Q. Now, will you describe why that work was necessary in repairing the damage to the building? A. This work was necessary because on the front, the star bolt, the new iron channel had been put

on the building and had, of course, defaced the front of the building. We wanted to paint it in order to cover it up in order to make it more appealing to possible tenants.

56 The woodwork and the metal at the side and the back of the building was also much damaged from the debris and dust.

The metal fire escape was so covered at many points with debris that you couldn't even see that it was a fire escape.

Q. What is the next necessary item? A. The next item is furnish and install eight pieces of bull nose on edge of step treads on public stairway; cost, \$22.00.

This again was caused by the removal of the debris and also because of damage when the workmen were in the building. This is the edge of the step, around the edge of the step as you go down.

Q. Let me ask you this question in connection with that item: Were they able to use the elevator at all in connection with any removal of debris or carrying the plaster up or down? A. No, the elevator inspector would not even come and look at the elevator until after some of the work had been taken care of. So they had to take it down the stairway.

Q. All of this activity took place from the first to the fourth floor, by using the stairway? A. Yes, it did.

57 Q. What is the next item? A. The next item is to patch plaster on sidewall rear room, fourth floor; \$58. This rear room had again been damaged because of debris being both thrown out of the window and being in the room.

The next item is to furnish and install shoe molding around front room, fourth floor. This is shoe molding which the contractor Lesmark had not installed as part of his work. That item is \$32.00.

Q. Did he install shoe molding in any room? A. In some of the rooms that needed it, but he did not install it on this floor, the fourth floor, and when we spoke to him about it, he just sort of forgot about it.

Q. What is the next item of necessary repair? A. The next item

is to take out and fit properly, then metal weather-strip all movable exterior windows on first to fourth floors inclusive. Windows to be done in standard cross grained zinc, tongue and groove type. Place all sash cords, using Sampson Sash Cord No. 7. One front door fit, and rebronze using No. 136 Spring bronze. Remove all loose compound and re-caulk all openings set in masonry, first floor to top floor inclusive; to be caulked with Pecota Compound, packing cracks with oakum where needed. Cost, \$754.00.

58 Q. Was that work all necessary? A. Yes, this work was all necessary. However, there were 23 windows in the front part of the building and by taking -- there were 38 windows in the entire building -- by taking 23/38 of the total price of \$754, it comes to 6/10 approximately and 6/10 of \$754 would be \$452 for repairing the windows in the front of the building.

Most of these windows were out of plumb, some of them were weather-stripped and all the weather-stripping had to be taken out; all of them had to be caulked and many of the sash cords had been broken during the accident.

Q. What about the other windows? A. The other windows also were some of them out of plumb, but because they were in the back part of the building, I have not included them in my claim. The front door fit, of course, was due directly to the accident and really should be another item out of this but for easier computation, I simply included the front door in this \$754.00.

Q. I don't believe I understand what you mean by included. A. Well, the bill for the windows and the front door fit is all included in the \$754.

59 Q. I see, but you excluded from your total claim what? A. I excluded from my total claim \$302 from the bill of \$754, making the bill for the weather-stripping on the windows \$452.

Q. That was for these repairs? A. That was for these repairs to the windows and the front door in the front of the building.

Q. What is the next item? A. The next item is to hang six doors and furnish hardware for doors that was missing hardware. Install door lock on one door; \$75.00.

Some of these doors had been removed; some of them were out of plumb and had to be rehung.

The next item is painted both sides of six doors and shoe molding, one coat; \$45.00.

The next item is painted inside of elevator, one coat; \$20.00. Of course, this was because the elevator was so heavily coated with dust and debris.

Q. Now, are there other items on that bill covering work that was done that you are not claiming damages for? A. Yes, there are.

Q. Would you indicate the total amount of those items? A. Including what I have taken off for the windows in the back, I have deleted from the Adams bill \$553, making the total \$2,469.00.

60 Q. Now, could you just list the items that you did not include as part of your claim, that is the various work done? A. I installed a scenic wallpaper in the hall on the first floor to make it more attractive and molding around it and molding beside it to make it look more attractive. I did not include that or any part of those items.

I did not include the new galvanized downspouts in the front and rear of the building.

* * * * *

62 Q. Now, were any of the items covered on Plaintiffs' Exhibit 31 necessary in covering items of necessary repair to damage? A. Yes, they were.

Q. Would you describe which ones? A. The items that were done for repair of damage included cleaning and waxing of two rooms, \$17.50; putting on new shoe molding at cost, \$21.15; making a total of \$38.75.

The next item due to the damage was to install asphalt tile in rooms that had linoleum on the floors and including the masonite

underlaying in two hallways. Although there were four hallways, they only did two hallways. This was \$510.

- 63 Q. Why was this necessary? A. This was necessary again because of the debris and because of the activity of the workmen in the building and because the building had stayed vacant for so long.

Q. Are there any other items that relate to necessary repairs?

A. Yes, not due to damage. Then I also installed rubber treads on the stairway from the first floor to the fourth floor with asphalt tile on the landing, for the sum of \$445.00.

Then I installed rubber risers on the stairways from the first to the fourth floors, for the amount of \$90.00.

These two items are not included in the claim.

* * * * *

- 65 Q. Mrs. Pryce, I hand you what have been marked Exhibits 33 and 34 for identification. Will you describe those documents, please?

A. * * * Exhibit 34 is the bill from the Wizard Locksmith Company for work done at 1917 I Street.

Q. Was this work done that was necessary in repairing damage?

A. Yes, it was.

Q. Would you state what the item is and then state why it was necessary? A. The heavy Yale door closer on the front of the building, because the door had been knocked out of plumb, was in bad shape.

Q. Would it work? A. No, it wouldn't work; so I had a new one installed and he gave me a trade-in allowance of \$5 on the old one, making a total of \$19.78.

* * * * *

- 67 Q. Mrs. Pryce, I hand you what have been marked Exhibits 37 and 38 for identification. Could you describe what those documents are, please? A. Exhibit 37 are the bills from Mr. Bernard Locraft,

68 civil engineer, for consultation and inspection on 1917 I Street. Exhibit 38 are the checks in payment of these bills.

Q. Now, for what purpose was he employed? A. He was employed to instruct me as owner how best to protect my building and to be sure that it was made safe again for occupancy.

Q. What does his bill cover in the way of services? A. Examination and report on property on July 31, \$100.

Inspection and interviews at the District Building, review of complaint papers on August 31, \$75.00.

September 30, interviews at District Building, visiting the site regarding the shoring and breaking, \$72.25.

The total on that bill is \$247.25.

The next examination was on October 31, to examine the anchors at the site. Those were the anchors in the front of the building; \$16.50.

The next was a visit to the site on November 30, 1959; \$14.50.

The next was on March 31, 1960, an interview re the restoration of the building; \$14.50.

Q. What was the total amount? A. The total amount was \$292.75.

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* * * * *

MR. PECHACEK: If Your Honor please, at this time I should like to offer Exhibits 37 and 38.

MR. CHANNING: If Your Honor please, I would like to object to these on the grounds that the measure of damages legally is in the alternative, is either the difference in the cost of repairs before and after the occurrence; the difference in market value before the occurrence and after the occurrence; or in the alternative it is the cost of repairs plus a proper loss of use. Now --

THE COURT: Aren't engineering services cost of repairs?

MR. CHANNING: I don't believe that they are, Your Honor. That is what my objection goes to. It is a consultation fee and I do not believe that it is a cost of repairs. I do not believe that there has been any testimony that any of these repairmen used this advice in connection with their repairing, and I just don't think the consultation with professional people under these circumstances is a cost of repair.

70 MR. PECHACEK: If Your Honor please, I could develop further some of the things that Mr. Locraft did but I feel they were a necessary and integral part in not only repairing her building but also under the circumstances of this case, of saving her front wall.

THE COURT: I will overrule the objection. The exhibits will be admitted.

* * * * *

[BY MR. PECHACEK:]

Q. Mrs. Pryce, I hand you what has been marked Plaintiffs' Exhibit 39 for identification. Would you describe those documents?

71 A. Plaintiffs' Exhibit 39 are a series of checks to people whom I paid to help carry out the debris * * *

* * * * *

72 Q. Did this extend over a period of time? A. This extended from the 9th of September until the 26th of April of 1960. The 9th of September, 1959 to the 26th of April, 1960. A total of \$149.00.

* * * * *

Q. Now, Mrs. Pryce, I want to ask you what efforts did you make with reference to finding a new tenant for your building and approximately when did you initiate these efforts? A. I first went in late August to the Small Business Administration. They had occupied quarters in the building two doors down the street and I understood from the neighborhood that they were in need of more space, so I consulted with them in late August.

As I was at the building during October, people stopped in to see
73 about renting the building and when it would be ready but I was unsuccessful in any efforts, so on the 7th of December -- this is before Mr. Abrams' men had finished cleaning the building --

* * * * *

THE WITNESS: December 7, I listed the property for rental with
74 Thomas J. Fisher & Company. Mr. James Knox at Thomas J. Fisher and Mr. Marshall made great efforts to rent the property for

me. I also contacted by word of mouth, by talking with people, everyone whom I could think who could possibly be interested in space.

BY MR. PECHACEK:

Q Did you list with any other real estate firms? A. On the 11th of May, I think it was.

Q. That would be 1960? A. Yes, 1960. I listed the property for both sale and rent with Thomas J. Fisher.

Q. Did you list with any other real estate firms for either sale or rent? A. Yes, and in July, I listed the property for sale or rent with Thomas J. Fisher, Shannon and Luchs, Frederick Derems and Weinberg & Bush.

Q. What ultimately happened as a result of one or more of those listings? A. As a result of the listing of Weinberg and Bush, I signed a sale contract on the 13th of October and the building was settled on the 15th of December.

Q. Was there ever a period of time from the time of this accident on July 28, 1959, until the sale of the property when the building was leased to a tenant? A. No, there was not.

75 Q. Now then, during the period from the time of the accident, July of 1959, what do you calculate your rent loss to be? A. My total rent loss would be 17 months times the monthly rental which was \$805 a month. The total rent loss would be \$13,865.00.

Q. Now, what services were you providing during the time the building was leased to Ver Standig at the rate of \$805 a month? A. During the time the building was leased to Ver Standig, I was providing heat, light, elevator service, janitor and char service and various items of maintenance, such as, plumbing, electric light bulbs, janitor supplies, the usual maintenance items in the building.

Q. Now, did you make a calculation as to what the cost to you was for these various items and services you provided? A. Yes, I took an average of what these various services cost in the years of 1957 and 1958.

Q. And do you have figures that would show what those items were? A. Yes, I do. In 1957, these items cost me \$4,156.80; and in 1958, the same items cost me \$4,154.01 cents.

76 MR. CHANNING: I wonder if the record would indicate the record that the plaintiff is reading from?

THE WITNESS: I am reading from a synopsis that I made of my expenses in the book which I have kept of my own records and for income tax purposes, which income tax -- I believe they are all here.

BY MR. PECHACEK:

Q. Is this large book that you have the book of original entry?

A. Yes.

Q. I mean at the time the transaction occurred, did you make the entry at that time? A. Yes, I did.

Q. And this summary that you have, when was that prepared?

A. This was prepared about a month ago.

Q. Is that simply for your convenience so that you can more easily refer to the figures? A. Yes, it is.

Q. Are these figures based upon your original records? A. These figures are directly from my original records.

Q. What do those figures -- strike that.

77 What did you calculate the total cost of these services to be on either a monthly or an annual basis? A. On an annual basis, it came to about \$4,100, which averages out to about \$346.00 a month. Multiplying that by the 17 months the building was vacant, the services would have cost me for 17 months \$5,865.00.

Q. Actually, during that period that the building was vacant, did you have any expenses at all for heat, light and so on? A. Yes, I did.

Q. Would you itemize those expenses and explain also in connection with them why it was necessary to expend those items? A. In 1959, I had to pay coal. This is from the 1st of August until the 31st of December. I had to provide heat in the building both so Mr. Abrams could work there and also to help the plaster to dry up. The coal came

to \$113.22 for that period. This is the period from the 1st of August, 1959, to the 30th of December, 1959.

Q. What happened at that time? A. In December of 1959, I installed a gas furnace and the gas for the year 1960 from the 1st of January until the 30th of December, 1960, was \$463.85. This was also because the workmen had to have the heat on in order to complete
78 their work in the building and in the fall, I again had to turn the heat on so that the prospective tenants would feel that it was a pleasant place to come into.

My electricity from the 1st of August, 1959, until the 31st of December was \$133.08. In 1960, it was \$21.23.

In 1959 from August 1st until December 31st, I had to pay my janitor who was put on watchman basis after the 1st of September \$260. My char girl, I gave a month notice to so I had to pay her \$100 for the month of August and, of course, she didn't work that month.

In maintenance items, the water was \$18.82. This is all for the period of August 1st until December 31st of 1959.

My regular trash removal was \$10.00. I had to pay \$31.55 for cleaning materials at one time and \$26.30 at another time; and \$22.00 for inspection by Whiting Elevator people, making a total of \$108.67.

So from the 1st of August until the 31st of December, 1959, my total for services that I had to pay was \$703.97.

Now, for the 1st of January until the end of December, 1960, my watchman-janitor bill was \$550.00; the maintenance was \$100.18 and that is itemized: the water bill of \$17.73, window cleaning of \$40.00, cleaning services \$16.00, and a bill for supplies for the janitor to facilitate the cleaning of \$9.37, \$6.94, and \$10.14, making a total of \$100.18.

79 So my actual expenses in 1960 for keeping the building open were \$1,134.82, making a total for the 17 months of \$1,838.00.

Q. Now then, in calculating your total rent less, you start out with the basic figure of \$13,865, is that correct? A. That is right.

Q. That is your gross net? A. That is my gross net.

Q. And what is deducted from that? A. Less my total expenses of \$5,865.00.

Q. And that leaves what, \$8,000? A. Yes, that is right.

Q. And then in addition to that \$8,000, you spent what? A. \$1,838, making a total rent loss of \$9,865.00.

Q. Now then, were there any items --

MR. CHANNING: If Your Honor please, I wonder if I may at this time state that I object to the item of \$1,865 and move to strike it on the basis that we are here trying to find out what damage is caused by this occurrence and she has stated what the gross rental was and also what the amount was that should be taken from that because those would have been expenses had she had the place rented, but I do not
80 believe that you can also claim at this time other costs that were used in connection with the upkeep and maintenance of the building and in addition to a loss of rent. For loss of use, loss of rent is a measure and you take from that whatever sum you would have to pay to keep the building rented, but you cannot add on top of that this other figure which is a maintenance figure for an empty building. What you are doing is adding that on top of the rent and I do not see that that is a direct -- has any causal connection between that and the occurrence.

THE COURT: I will deny your motion to strike. I will afford you an opportunity to challenge these figures either by evidence or by argument at the proper time.

BY MR. PECHACEK:

Q. Mrs. Pryce, were there items of damage to your building that were not repaired? A. Yes, there were. You mean that were not repaired by me or by anyone else?

Q. Yes. A. Yes, there were.

Q. Would you indicate what those were? A. There were two: One was the damaging of the floors which had been -- they were no longer level and when I had consulted someone in August as to a

possibility of leveling these floors in the front part of the building, I
81 was told that it would be exorbitant.

* * * * *

Q. Was there any other item of permanent damage? A. Yes,
the building had gotten a bad name, by that I mean --

* * * * *

Q. Mrs. Pryce, was there any publicity given to this accident?

82 A. Yes, there was a good deal of newspaper publicity given to it,
showing people coming out of the falling building and carrying their
books and having to hurry out. There were several newspaper articles
about it on the days following.

Q. Were there any pictures? A. Yes, there were pictures of
the building and of the barricades.

Q. Did you encounter in your attempts to find a tenant any re-
action to the accident? A. Yes, I did.

* * * * *

83 Q. Mrs. Pryce, did any of these real estate brokers that you
listed the building with either for rent or sale, did they post signs or
do any advertising as far as you know? A. Oh, yes. Fisher's had
a sign on the building and they did a great deal of advertising besides
contacting people by mail -- I mean, a great deal of newspaper adver-
tising as well as contacting people by mail.

* * * * *

84 CROSS EXAMINATION

BY MR. EDGERTON:

* * * * *

86 Q. At what value is the property listed in your federal estate
tax return for your father's estate? A. The total value was \$35,014.00.

Q. Now, when did you sell the property, Mrs. Pryce? A. Dec-
ember 15, 1960.

Q. What was the gross sale price? A. \$67,500.

Q. Now, you had previously rented the entire building, as I

understand, for \$805 per month? A. Yes, sir.

Q. Was that based on cubic value of the space or how was that amount arrived at? A. That came to about \$2.40 a square foot, that is, of available office space.

Q. At what did you offer the property for rental after it had been repaired? A. After it had been repaired?

Q. Yes. A. I listed it first at \$815.

87 Q. \$815.00? A. Yes.

Q. Did you receive any offers from prospective tenants? A. None that were competent -- I mean, none that were able to --

Q. Meet the price? A. That is right.

Q. Did you receive any offers at any price? A. Only for partial occupancy, which were not backed up by -- in other words, their credit reports were not such that I would be willing to take them as tenants.

* * * * *

Q. Were there any acceptable tenants that made offers below the price which was offered? A. No, sir, not even below the price which was offered.

* * * * *

88

CROSS EXAMINATION

BY MR. FRIEDMAN:

Q. Do you know the approximate age of that building at the time of 1959? A. The building was built in 1902, Mr. Friedman.

Q. 1902? A. Either 1901 or 1902.

* * * * *

89 Q. Now, Mr. Locraft was employed by you, was he? A. Yes, he was.

Q. And isn't it a fact that he consulted with Mr. Abrams of Lesmark, Incorporated, and with an engineer employed by Mr. Abrams to ascertain what had to be done to your building? A. Yes, he did.

Q. And they agreed upon the things that had to be done? A. Yes, they did.

Q. And these things were done by Mr. Abrams? A. Eventually.

Q. Yes. They were done? A. Eventually.

Q. Now, let me ask you, Mrs. Pryce, what was the condition of the floors in your building prior to July 29, 1959? A. They were clean and in good repair.

Q. Were they level? A. As far as I know, they were level; I had had no complaints and, as far as my visual inspection, they were level.

Q. The floors were covered with a kind of covering were they?

90 A. They were covered with linoleum because they had been recovered right after the war when there was nothing else available.

Q. The last time they were recovered, this installation of recovering the floors was made when prior to July of 1959? A. When I had the general renovation of the building after I inherited it.

Q. And you inherited the building in 1946, is that correct?

A. That is right.

Q. The floors had not been touched since that time? A. Oh, yes, the tenant himself had put in some new floors.

Q. When was that? A. I would have to check my records to give you the exact date.

Q. Do you have an approximate idea of that time? A. I would say in the period from 1946 to 1958, the 12-year period. It would probably have been about 1952.

Q. That is the tenant Ver Standig or a prior tenant? A. The tenant Ver Standig put the flooring in the top floor himself.

Q. And he did not install any covering on any other floors? A.

91 No, sir.

Q. And the last time prior to July of 1959 when these floors below the top floor were installed was right after the war in 1946, after you inherited it? A. Yes, sir.

Q. Now, when between 1946 and July 1959 had you painted the exterior of the building? A. I would say probably in 1955, but again

I would have to check my records for that.

Q. Was the entire exterior, that is the front and back walls, painted in 195 -- A. No, the front wall was painted and the trim of all the windows was painted. I never painted the back brickwork. I simply painted the windows back there.

Q. When prior to July of 1959 was the exterior of the front of the building painted? A. I would say about 1955.

Q. And that was done by you or someone on your behalf? A. Yes, that is right.

Q. That included the front windows? A. Oh, yes, sir.

92 Q. Now, when prior to July of 1959 did you do any painting to the interior of this building? A. The tenant did his own redecorating in the interior.

Q. When was the last time it was done by the tenant? A. He had done several offices within the year before the accident occurred.

Q. At his own cost and expense? A. At his expense.

Q. When prior to that time had they been done, prior to within the year of 1959? A. Each time Mr. Ver Standig took over another office as it became vacant, I redecorated it for him.

Q. That was over a period from 1946 to what year? A. He took over the entire property in 1957. I think he took over the entire property in July of 1957.

Q. Now, how many tenants did you have in there when you inherited the property, Mrs. Pryce, approximately? A. The property was vacant because the OSS had just vacated it when I inherited it.

Q. When you rented it, how many rentals did you have at first? A. Mr. Ver Standig was my first one and gradually, I got the entire building full.

Q. Over what period of time? A. I would say two months.

93 Q. How many tenants did you have when the building was completely filled? A. Mr. Ver Standig had the top floor. I had two tenants on the third floor; two tenants on the second floor and two

tenants on the first floor, which made a total of seven tenants and I rented the front part of the basement for storage purposes to someone else, which made eight tenants.

Q. Now, is it true that your tenancy with the Ver Standig organization was a month-to-month tenancy? A. That is correct.

Q. That is to say, either he could move upon giving a month's notice or you could have him removed upon giving him a month's notice? A. That is correct.

Q. For how long a period had that month-to-month tenancy existed? A. This had existed since July 1957 because Mr. Standig's last lease had run out July 31 of 1957, I believe it was, and we had a consultation about doing redecorating and installing a gas furnace at that time and he felt that his finances and commitments at that time were in such a state that he did not want to have a lease, that his
94 creditors would not like him to have a lease.

In the fall of 1958, we again had a consultation and had further bids on a gas furnace and on some decorating that had to be done, and Mr. Ver Standig again felt that because he had just opened a new office in Norfolk and because he had various creditors that he did not want to sign a lease at that time.

However, he had done a great deal of redecorating at his own expense, including building in a great many specialized items that his particular advertising company needed.

Q. That was all done at their expense, not yours? A. That was all done at their expense.

Q. Now, you have testified, Mrs. Pryce, concerning the plaster and painting work that Lesmark Company did after July 29, 1959. Will you tell me, please, what portion of the building and what rooms in the building and what floors where painting and plastering was done by or on behalf of Lesmark? A. The front rooms of the building from the top floor down to the basement.

Q. When you say "the front rooms", how many rooms do you

include on each floor? A. Two rooms and the lavatory that is connected to them and the small hallway that some of the offices had.

95 Q. And all the plastering work and all the painting work was done by or on behalf of Lesmark to that portion of the building?

A. Only to the offices, not the public hallways.

Q. Yes. Now, during that time, of course, the elevator was not being used? A. No, it was not.

Q. Will you tell me, Mrs. Pryce, what kind of stairways you had and what kind of steps were there in July of 1959? A. They were wooden steps with a type of covering on them that also included a mount edge on the steps and the landings had tile on them.

Q. The steps were covered with a linoleum? A. Yes.

Q. And the nose of the steps were covered with metal strips? A. Yes.

Q. And when had that installation been made prior to July of 1959? A. The latter part of 1946.

Q. And no repairs or replacements had taken place between 1946 and 1959? A. No, not to the stairs.

96 Q. That is what I am talking about.

Now, can you tell me, Mrs. Pryce, when the last time was prior to July 1959 that you had repaired or replaced any plaster in the building? A. In either the fall of 1958 or the spring of 1959 I did some plaster work in the front room of the third floor.

Q. And when prior to that had you done any plastering at all? A. There had been no necessity for any since I had done the renovations except the usual spatting that is done when you paint.

Q. Now, when prior to July of 1959 had you had your elevator inspected? There was only one elevator, am I right? A. Just one elevator.

Q. Was that manually operated or a self-operating elevator? A. Self-operating.

Q. It was automatic? A. Yes, sir.

Q. When prior to July of 1959 had you had that elevator inspected?
97 A. I think it was the 18th of July 1959. I had the monthly service.

Q. That is the same month of this occurrence? A. Yes. It is inspected every month.

Q. And it is required to be inspected every month? A. No, it is not required to be inspected every month but I had an elevator service that did inspect it every month.

Q. I see. Well, first let me ask you about the inspection by the District Government: Is that required every year? A. It had been a year in 1959.

Q. That was required once a year? A. Yes, sir; that is right.

Q. You had a maintenance contract with the Whiting Elevator Company, is that right? A. That is right.

Q. On a monthly basis? A. Yes.

Q. And you paid them how much? A. \$22.00 a month.

Q. What did that include? A. That included inspection and replacement of any small parts.

98 Q. And it included the greasing and oiling? A. That is correct.

Q. Did it include the replacement of cable if that were necessary?
A. No, sir, the cable is very expensive.

Q. That was not a full maintenance coverage, in other words, that you had with Whiting? A. No, sir.

Q. Between July of 1959 or August of 1959 and -- strike that, please.

When was the elevator repaired and replaced in operation again after that, after it was closed down? A. I believe the District inspected it about the middle of December and I think that the bills will show that the work was done either in December or January.

Q. I show you what has been marked Plaintiffs' Exhibit 24, is that the bill that you referred to just now? A. Yes, it is.

Q. And that shows March 11, 1960; is that correct? A. I don't know whether that is when the work was done. Unfortunately, I was

very short of funds and that may have been the second bill they sent me.

Q. When do you say it was that the work was done? A. I would say it was probably in January of 1960.

99 Q. In the intervening period between July 1959 and January 1960, you did not have the Whiting Company come in for maintenance, did you? A. They made one inspection.

Q. And did they charge you for it? A. Yes.

Q. How much? A. \$22.00.

Q. When was that, do you recall? A. No, I do not.

Q. There was one inspection between July 1959 and January 1960, is that right? A. Yes, there was.

Q. And that was the only inspection or maintenance charge you paid Whiting Company for that period? A. That is right.

Q. \$22.00? A. That is right.

Q. Now, do you recall when it was the last time that you had the hoist cable replaced prior to January of 1960? A. No, I do not, but the records of Whiting Elevator Company or my records would show that.

Q. Do you have those records here? A. No, I don't have those records with me. The hoist cable has its own lubricant in the middle
100 of it so it --

THE COURT: Just answer the questions.

BY MR. FRIEDMAN:

Q. You don't recall when it was prior to December 1959 or January of 1960 that you had previously replaced the hoist cable? A. No, I do not.

Q. When had the elevator itself been installed? A. In 1946.

Q. Now, are you able to tell us whether or not you had the hoist cable replaced at any time after 1946 and prior to July of 1959?

A. I don't remember, Mr. Friedman.

Q. Do you remember whether or not between 1946 and July of 1959 you had the wiring replaced in the elevator? A. Oh, I am sure

that that work had been done.

Q. Do you remember when it was? A. No, I do not.

Q. Do you remember when it was prior to July of 1959 that the selector chain had been repaired or renovated? A. No, I do not.

Q. Do you know whether in fact it had been? A. No, I would have to get records of Whiting Elevator Company to find that out.

101 Q. Now, you have testified, I believe, that you had the electric fixtures in the front of the building removed and stored in the back of the building. A. Yes, I did.

Q. And were those same fixtures replaced? A. Yes, I had them replaced.

Q. They were the same fixtures? A. Most of them were; some of them, I think, were damaged.

Q. In what condition of damage were they, do you know? A. No, I don't recall the exact damage to the fixtures but I know some of them had to have some parts replaced.

THE COURT: We will take a short recess now, gentlemen.

(Whereupon, at three p.m., a recess was taken.)

THE COURT: You may continue, Mr. Friedman.

BY MR. FRIEDMAN:

Q. Mrs. Pryce, I understand from your direct testimony -- if I am in error, please correct me -- that you had the Electrical Associates firm remove the electrical fixtures and store them in the back of the building and then they replaced them? A. Yes, sir.

102 Q. That included the lamp and bulbs where they were installed; is that correct? A. This included the entire fixtures which were in the ceiling and the air-conditioners which were in the windows.

Q. These were not removed by either Lesmark or any one of his employees? A. The bill is right there --

THE COURT: No. Just answer the question.

THE WITNESS: No, they were not.

BY MR. FRIEDMAN:

Q. Do you know what kind of fluorescent lamps were in those

fixtures prior to July 29, 1959? A. I believe they were called day-light bulbs. They were the long fixtures. Mr. Ver Standig also put in some fixtures of his own for which I also provided bulbs.

Q. Did the fluorescent lamps include fluorescent starters?

A. Yes, sir, they did.

Q. Did they include the fluorescent balisse? A. Yes, they did.

Q. Did they include regular fluorescent lamps or rapid start fluorescent lamps? A. I think we had both kinds.

103 Q. You had both kinds. Do you know how many of each? A. No, sir, I don't.

Q. I believe you also stated that the Electrical Associates also removed the air-conditioners and stored them and then replaced them?

A. Yes, they did.

Q. Now, can you tell me whether or not Lesmark repaired any of the plaster or did any of the painting in the rear of your building?

A. To my knowledge, he did not.

Q. Did you ever call upon him to do that? A. We discussed it with him and he didn't feel that this was part of his indemnity, shall we say.

Q. When was that? A. I don't recall what time.

Q. When was the last time prior to July, 1959, that you had painted or varnished the railings on the stairs? A. I wouldn't be able to say as to that, Mr. Friedman. My janitor had done it for me maybe two or three years before the accident. I don't recall the exact date.

Q. Now, you testified I believe that you received copies of your Plaintiffs' Exhibits 20 and 21, being specifically a letter of July 29, 1959, from Mr. Dripps of the District Building and a letter of August
104 28, 1959, from Mr. Ilgenfritz of the District Building? A. Yes, I did.

Q. And you were aware, were you not, that the District officials that I have just mentioned had directed Lesmark, Incorporated, to

restore the party walls and all other parts of the building at 1917 I Street to as good a condition as it was immediately prior to the operations of Lesmark? A. Yes, sir.

Q. And you agreed and let them come in there and do that work?

A. I wrote a letter to Mr. Charron permitting his contractor, Mr. Abrams, to come into the building to do that work.

Q. This would be after consultation with your consultant, Mr. Locraft? A. That is right.

Q. And he in consultation with Mr. Manuccia, the engineer for Lesmark, and Lesmark and Dreyfuss had agreed upon the work that had to be done? A. They agreed to do a certain amount of work.

Q. Didn't they agree as to the work that had to be done?

105 MR. CHANNING: If Your Honor please, I object to this, his question including Mr. Dreyfuss. It has no connection with Mr. Dreyfuss in the direct testimony and I think he is putting words in the witness's mouth. She said they agreed to do so and so; Mr. Dreyfuss was not mentioned in her direct testimony.

THE COURT: Will you read the pending question, Madam Reporter.

(The record was read by the Reporter.)

THE COURT: What do you say to the objection, Mr. Friedman?

MR. FRIEDMAN: Well, let me rephrase my question, Your Honor.

BY MR. FRIEDMAN:

Q. Isn't it true, Mrs. Pryce, that your consultant that you have previously mentioned, Mr. Locraft, had agreed at least with Lesmark, Incorporated, and Mr. Manuccia, who is a consultant employed by Lesmark, about the work which had to be done in response to the District official's letter that the building be restored in as good a condition as it was immediately prior to the operations? A. Mr. Locraft consulted with Mr. Abrams. As to Mr. Manuccia, I have no knowledge of that. He agreed as to the amount of work that had to be done in response to the District's letter, but he also indicated in his
106 report that there should be further work done.

Q. Who indicated? A. Mr. Locraft.

Q. Do you have those reports in court? A. Yes, we do.

MR. FRIEDMAN: May I see them, please.

(Counsel perusing files. Short pause in proceedings.)

MR. PECHACEK: Your Honor, I have several copies. This is a complete set. This has all but one. I will just give them this group.

THE COURT: Very well.

MR. FRIEDMAN: May I have your indulgence for half a moment, please?

THE COURT: Certainly.

(Short pause in proceedings.)

BY MR. FRIEDMAN:

Q. Mrs. Pryce, you were aware, were you not, that your consultant, Mr. Locraft, apprised you that the rear portion of your building did not appear to be affected by the excavation work? A. As to the structural difficulties, it did not appear to be affected; he did not say anything in his report about whether the damage from the debris and dust and the workmen being in the building had damaged it.

Q. If I read you a sentence, will this refresh your recollection, from this letter to you of July 3, 1959: "The rear portion of the building did not appear to be affected by the excavation work."

THE COURT: I think this is repetitious, Mr. Friedman.

MR. FRIEDMAN: I beg your pardon.

BY MR. FRIEDMAN:

Q. Would you state, Mrs. Pryce, whether or not Mr. Locraft reported to you that any electrical work had to be done? A. Mr. Locraft was the one who suggested to me on the job that I have the electrical fixtures removed and that I also have all the electrical wiring checked.

Q. Did Mr. Locraft suggest to you that repairs would have to be done to the elevator? A. He said that undoubtedly repairs would have to be done to the elevator and I would have to check with the elevator inspector and with my elevator maintenance people.

Q. Did he report that to you in any of the letters he wrote to you or in the reports he gave you in writing? A. No, sir, he did not.

108 Q. Did he report to you in writing in any of the letter reports to you that any painting or plastering work had to be done other than that which Lesmark did? A. I don't believe he did.

Q. Did he report in writing in any of his letter reports to you that any of the floors had to be repaired? A. I think you will find a letter in that group that goes into the fact that he would like to have a consultation with us as to permanent damage to the building.

Q. Did he make a specific reference to any of the floors? A. This is what we were talking about.

MR. FRIEDMAN: May I have your indulgence, Your Honor?

THE COURT: Certainly.

(Short pause in proceedings.)

BY MR. FRIEDMAN:

Q. Specifically, Mrs. Pryce, did Mr. Locraft report to you in writing that the linoleum floors had to be replaced? A. No, sir, we never discussed linoleum floors.

Q. When was it that you first listed the premises for rent with Fisher and Company or any other company after July 28? A. On
109 December 7, 1959. This was before Mr. Abrams got his people out of the building.

Q. Then, I believe you stated that again in May and in July, you listed the property for sale or for rent with Mr. Fisher on two occasions; is that correct? A. I listed it for sale or rent on May the 11th with Thomas J. Fisher and in July, I believe it was the 5th of July, I listed it for sale or rent with Shannon & Luchs, Thomas J. Fisher, Frederick Berens and Weinberg and Bush.

Q. Now, I believe you mentioned that several prospects made offers which were not acceptable to you because of their credit rating? A. This is what my agent told me.

Q. Do you know who those prospective tenants were? A. No, I had left it with my agent to take care of it for me.

* * * * *

110 MR. CHANNING: I would like to reserve my right to recall her, Your Honor.

THE COURT: Very well.

Do you have any redirect, Mr. Pechacek?

MR. PECHACEK: If Your Honor please, I have just a very few questions.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. PECHACEK:

Q. Mrs. Pryce, you referred to the value of your building at the time you inherited it in 1946 at \$35,014.00. A. That is correct.

Q. Without going into a great deal of detail, what was the general -- what was the nature of the general improvements that you made after that and approximately how much did you spend? A. I built an elevator shaft; did a complete wiring and plumbing job; did flooring and decorating. The capital improvements amounted to about \$28,000 and I also had to pay off an \$8,000 note, making a total evaluation of the land and building of \$72,062.00. The value claimed for the building was \$60,723.00.

Q. Was that for federal income tax purposes? A. That was for federal income tax purposes and then at a later time, I made additional
111 capital improvements amounting to \$5,060.00 at one time.

Q. When was that? A. In 1948.

Q. What did you have done? A. I put in a new boiler and had further renovations done as far as painting and that type of thing; and in 1949, I had a new roof put on; and in 1953, I had copper put on the mansard part of the roof, making a total value claimed for the building in 1953 of \$67,062.00.

Q. That is for the building itself? A. That is for the building itself.

Q. Exclusive of the value of the land? A. Exclusive of the value of the land.

Q. Now then, I think I neglected to ask you if you had the figure representing the improvements that you made following the accident in 1959, but not counting any repairs that are claimed or any of the items that you said you were not claiming, that they were included as part of the total bill, such as Adams Renovating? A. That is correct. The total of that bill is \$3,156.00.

Q. What other items? You have covered the Adams Renovating bill and you have covered the Gott's Linoleum Company bill. A. All
112 right. The air-conditioners, I bought from the Ver Standig people for \$700. I put in a new gas furnace which cost me \$1,080. On the stairways and landings, I put in the rubber treads and rubber risers and tile on the landings; that was \$618.00.

Q. Was that Gott's people? A. That was by the Gott's people.

Q. You have testified as to that. A. Yes. Then the deletions from the Adams bill was \$553.00, and I had to have some work done on the iron railing in the front of the building for \$35.00, and I had to have some further plumbing done in order to have the building get an occupancy permit on which the sales contract depended and that plumbing bill cost \$161.57, which brings the total to \$3,156.00 that I have not claimed as a matter of damage.

Q. Now, then, in cross examination reference was made to a conference you had had with Mr. Abrams. Do you recall how many conferences you had with him? A. I only spoke to Mr. Abrams on the day of the accident. Mr. Locraft had conferences with him, according to his letters.

Q. Didn't you have conferences with Mr. Abrams at the building
113 in connection with the plastering work? A. Oh, yes, I asked him many, many times to get some of the debris out and let's get with it, get going on the repairs.

Q. But did there come a time during the course of these conferences with Mr. Abrams when it was indicated what he would do and what he would not do with reference to the repairs of the building? A. Yes.

Q. Do you recall how many such conferences you had with him?

A. I would say probably two, but I could be refreshed on that.

Q. Generally when did these conferences take place? A. Well, they took place after the injunction hearing which was in the middle of September, so these conferences must have taken place in the early part of October.

Q. Where did these conferences take place? A. At the building.

Q. What did he do in the way of agreeing or disagreeing on what work he would undertake? A. He agreed only to do the work in the front of the building, front and front part of the building.

114 Q. Did you ask him about doing any of the other work? A. Yes, I did.

Q. And what was his response? A. He said no, it wasn't his responsibility.

Q. Did you on one occasion authorize Mr. Abrams and others to enter your building to make these repairs? A. Yes, I wrote a letter to Mr. Charron, I believe it was in September, authorizing Mr. Charron's agent, Lesmark and Mr. Dreyfuss -- I don't recall if I named them by name, but I authorized Mr. Charron to permit his men to go into my building to make the necessary repairs.

* * * * *

125

ROBERT ASH

called as a witness in his own behalf, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

Q. And where is your office, Mr. Ash? A. 1921 I Street, N.W.

Q. Do you own your own building? A. I do.

* * * * *

126

Q. Could you describe, not in great detail but in a general way, floor by floor the damage that occurred to your building? A. * * *

127 In my building in the rear room -- I might say that the building has three rooms on the first, second and third floors, plus a stairs, stairwell. There is a hall that runs along the east side of the building, that is, along the side toward the new building.

On the first floor, there was a crack, in fact the crack ran from the basement all the way to the roof that you could see through.

Q. Which part of the building was this? A. That was in the back room.

Then there were, as I recall it, two other rather extensive cracks although not so great that you could see through, running the length of the building, that is, the height of the building.

Then there were numerous lateral cracks running from lower on the east side and higher on the west in all of the lateral rooms in the building. The plaster was off to some extent in all of the rooms in the building, both ceiling and sidewalls.

128 In the lavatory on the third floor -- when I described the rooms on each floor, I omitted to say there was a lavatory on the first, second and third floors. In the lavatory on the third floor, which was finished in ceramic tile, a great deal of the tile had come off on the walls and also on the flooring. All of the walls were in bad condition. Quite a few of the doors wouldn't close. There was a great deal of dust.

* * * * *

134

Washington, D.C.
November 29, 1963

* * * * *

138 Q. Now Mr. Ash, prior to that accident in July 1959, what was the condition of your building? A. It was excellent.

Q. How was it being occupied? A. The first, second, third, and fourth floors were being occupied by my law clerk.

Q. What about the basement? A. The basement, the front room was used by Mrs. Ash, who conducted a decorating business.

* * * * *

139 Q. And had you had any work done in the immediate period prior to the accident? A. Of course, I bought the building in 1954 and on July 2d. We occupied it at approximately the first of October and before the -- the building was structurally sound -- and before the office moved into it, I spent just under \$17,000.00 putting it in as good condition as I could have it put in.

Q. Generally speaking, what all did that include? A. It included any repairs that might have been necessary at the time. It included a new heating system. That was the biggest item and then wherever there was any damage of any kind. The building had been used as a rooming house for quite awhile. So, any damage of any kind we had repaired. We had it fully decorated, of course. And we put it in as good a condition as it could be put in.

Q. Now Mr. Ash, I hand you what has been marked as Plaintiff's Exhibit 42 for Identification, would you describe those documents, please? A. Well the first is a bill from the Hamilton Decorating

140 Company in the total amount of \$2,108.75. Attached are two checks written on my office account, which is a personal account of mine, payable to the Hamilton Decorating Company. And one for \$750.00, another for \$1,358.75.

Q. Now can you state what portion of the items on that bill were in repair of damage to your premises? A. Well, I think that all of the items on the bill are due to the damage except there is a mail slot,

as I recall it, that was put in the front door for some reason. And also rubber pads were put on the steps, on the front steps.

Q. And those items, the mail slot and the rubber treads you do not regard as being attributed to that? A. No, I do not.

Q. Are you able to determine the amount involved with reference to those two items? A. The rubber treads are shown as \$65.00. There is no allocation as to the mail slot.

MR. PECHACEK: Your Honor please, at a later date we will have the supplier here who can testify concerning that item.

At this time, Your Honor, we should like to offer Plaintiff's exhibit 42 for identification.

* * * * *

142 Q. Mr. Ash, I hand you Plaintiff's Exhibit 43 for Identification, and Plaintiff's Exhibit 44 for Identification. Would you take up 43 for identification first, please? A. Yes, 43 is a bill of A. W. Lee, Inc. and it states on it, repairing and replacing plaster and installing ceiling tile \$1,170.00. And it is attached to my office account check for \$1,170.00.

Q. Do you know what work was done under that item of repair? A. Yes. One of the big items of damage was the loosening of the plaster in the building. The plaster kept falling off, and we had the plasterer in there two or three times, maybe four times.

And, particularly the ceiling plaster was loose. That that didn't fall off was loose and I was advised that it would be cheaper to put in tile, this block stuff made out of some sort of fiber, I don't know, rather than to attempt to plaster.

Q. Is that acoustical tile? A. I guess you could call it acoustical tile.

Q. Was that done? A. Yes, that was done.

Q. In what rooms was that done, Mr. Ash? A. That was done in the three rooms in the first floor; on the hall of the first floor; and on the three rooms on the second and third floor.

Q. In all of those rooms that you identified the acoustical tile
143 was installed on the ceilings? A. Well the tile, whatever it is,
it was installed.

Q. Is there any other item of damage covered on that bill? A. It
says repairing and replastering plaster.

Q. Do you know what item that was? A. Well, now I can't recall
just what rooms it was which this covers. There were at least three
items of plaster covered but due to the lateral cracks in the building,
quite a bit of wall plaster came off. And I believe it was in all of the
rooms. We had to go around and make rather extensive plaster re-
pairs to these walls.

Q. Who made those repairs, Mr. Ash? A. Well Lee made them
and I believe Walley and Sullivan made some and I think these exhibits
will show someone else.

Q. What does the item of plastering on the A. W. Lee bill cover,
if you know? A. I can't tell you just exactly what it covers except I
know we needed it on the lateral walls but I can't tell you exactly what
this covers. As I say, I believe one or possibly two of the contractors
did plaster there for one reason or another.

Q. With reference to the check marked Plaintiff's Exhibit 44 for
Identification? A. Yes.

144 Q. Who is that to? A. That is to A. W. Lee, Inc.

Q. And how much is that? A. That is \$175.13.

Q. Do you know what that covers? A. Yes, that was some more
plastering that Lee did at the request of Hamilton Decorating Company.

Q. Is that the reason no bill was submitted direct to you? A. I
assume so. I know I paid it. I have no bill.

Q. What part of the items covered by those two payments re-
presented work that was repaired on your building? A. Well I
wouldn't have done any of this work.

Q. Mr. Ash? A. I would say that all of it represents repairs.

MR. PECHACEK: Your Honor please, at this time I should like

to offer into evidence Plaintiff's 43 and Plaintiff's 44.

THE COURT: I will assume the same objections from all counsel. The objections will be overruled. The exhibits are admitted.

MR. PECHACEK: Thank you, Your Honor.

* * * * *

145 Q. Mr. Ash, I hand you what has been marked Plaintiff's 45 for Identification. Would you identify those documents, please? A. The top one is a bill of J. W. Conway, Inc. It is in the total amount of \$816.36. Attached thereto is my office account check for \$816.36. And the bill reads: Re-roof upper main roof over extending tin roof; install new galvanized iron wall gap; repair bottom on main side, replace upper rear gutter; replace downspout from upper roof. That is \$749.15. A separate item covered damaged wall of front \$67.21, making a total of \$816.36.

Q. Now what items on that bill were in repair or damage? A. I think with the exception of replacing the upper rear gutter, that they are all repairs.

MR. CHANNING: I move that be stricken. The witness says he thinks. There is no indication that he knows.

THE COURT: I think that these verbs are rather loosely used by all witnesses. I do not believe when they say I think, it is their opinion. I believe they are testifying to the best of their recollection. I will over rule the objection.

Q. Mr. Ash, are you prepared to indicate the proportion of that building in the terms of dollars that represents repair work? A. No, I can't. The upper rear gutter replacement. I don't know how much is allocated to that. I have no way of knowing.

146 MR. PECHACEK: Your Honor please, we plan to call the supplier to identify the bill.

THE COURT: I think it would be well to hold the tendering of this exhibit until you have testimony to determine how much is allegedly related to this accident.

Q. Mr. Ash, I hand you what has been marked Plaintiff's 46 for

Identification. Would you describe those documents, please? A. This is a bill of James J. Madden, who is a plumber. It is in the total of -- has one item of \$263.50; and several items totaling \$263.50; and several items totaling \$232.74. Attached thereto is my check for \$496.24 covering this bill.

Q. Are you able to say what part of this bill represents repair damage? A. To the best of my knowledge all of it does.

Q. And what is the total of that bill?

THE COURT: The witness said \$496.24.

MR. PECHACEK: Your Honor, please, I would like to offer Plaintiff's 46.

THE COURT: I will assume the same objections. The exhibit is admitted.

MR. PECHACEK: Thank you, Your Honor.

THE DEPUTY CLERK: Plaintiff's Exhibit 46 in evidence.

Q. Mr. Ash, I hand you what has been marked Plaintiff's exhibit 47, and ask you if you can describe those documents, please? A. This
147 is a bill of Standard Floors, Inc. in the total amount of \$215.40. Attached thereto is my check, office check for \$215.40 and it says to installation of rubber tile in two baths, first floor and third floor, \$118.00. To extra for 4 inch black rubber, coal base \$32.00; to extra for sub-floor preparation \$65.40 which total \$215.40.

Q. What is the amount of that bill that represents repairs to damage? A. All of it.

MR. PECHACEK: Your Honor please, at this time I would like to offer into evidence Plaintiff's 47.

THE COURT: I will assume the same objection and admit the exhibit.

* * * * *

Q. Mr. Ash, I hand you what has been marked Plaintiff's Exhibit 48 for Identification. Will you describe that document? A. This is a bill of Davis, Wick, Rosengarten Company, Inc., contractors in the total amount of \$58.01. Attached thereto is my office account check

for \$58.01, and that is itemized as cut holes for inspection of structural members. Repair leak in walls. General superintendent, 4 hours at \$5.00 a hour \$175.00, total \$20.70; labor \$21.86, insurance on labor \$5.95; material \$1.75, overhead 5 per cent, commission 10 per cent, total \$58.01.

148 Q. Where was that work done on the building? A. That work represented cutting holes in the ceiling at the party wall to determine if the joist had slipped to a sufficient degree to make the building dangerous.

Q. And was that work in repair of damage? A. Yes.

* * * * *

Q. Mr. Ash, I hand you what has been marked Plaintiff's Exhibit 49. Will you describe those documents, please? A. This is a bill of Smither & Company, Inc. The first bill is for \$12.00, the second one is for \$25.00. The first bill is dated November 17, 1959. It reads: Making survey and preparing estimate to restore damage to building at above address caused by demolition of the building at 1919 Eye Street, Northwest.

The second bill is furnishing labor and material to replace bad brick and to point up brick in the basement of the building at above address, \$25.00.

Q. Now what part of those documents represent repair to the building? A. Of course the 12.00 represents a survey of the damage, and the \$25.00 item represents repair.

* * * * *

149 Q. Mr. Ash, I hand you what has been marked Plaintiff's Exhibit 50. Will you tell us what that is? A. Plaintiff's 50 is a bill -- several bills of Bernard L. Lacroft, a civil engineer. One in the amount of \$70.25; one in the amount of \$12.50; and one in the amount of \$187.50.

Attached thereto are my office account checks in the amount of \$70.25; \$12.50; and \$187.50.

The first bill reads: Report on condition of premises, 1921 Eye

Street, Northwest, \$70.25. The next bill reads: shoring at 1921 Eye Street, Northwest, \$12.50. The next bill is a report on condition of the building \$187.50.

Q. Was that work, those services rendered as a result of the damage to your building? A. Yes.

MR. PECHACEK: Your Honor please, at this time I would like to offer into evidence Plaintiff's 50 for Identification.

MR. CHANNING: The same objection, Your Honor, please. Similar bills were offered into evidence. My objection is to the introduction of this last --

* * * * *

150 Q. Mr. Ash, why was the work performed by Mr. Lacroft necessary? A. The work was performed by Mr. Lacroft because the building was continuing to settle and I got concerned as to its safety and employed Mr. Lacroft, a civil engineer, to see it and advise me with respect to it.

Q. And what was that service that was rendered? A. That is the service rendered and in addition, apparently there was, according to the last bills, some charge for attendance at the injunctive proceedings.

THE COURT: I will overrule the objection and admit Plaintiff's 50, subject to any argument that counsel may desire to make on any
151 individual item in the bill such as testimony or anything of that kind.

* * * * *

Q. Mr. Ash, I hand you what has been marked Plaintiff's Exhibit 51 for Identification. Would you describe that document, please?

A. This is one of my office account checks payable to Frances Luna Ash, Inc. in the amount of \$47.07.

Q. Mrs. Frances Luna Ash, is that your wife? A. Yes, but this check was made to the corporation of Frances Luna Ash, Inc.

Q. And what was that for, Mr. Ash? A. That was for wall paper we used to paper the first floor hall after the accident.

Q. Was that a necessary item of repair? A. Yes.

152

* * * * *

Q. Mr. Ash, with reference to all of these bills, did you seek bids before you had the work done? A. Well -- it is a pretty broad question. I certainly asked Smither to give me bids and I recall I had bids totaling above \$800.00, which I thought were high. The problem was so difficult that I turned most of the work over to Hamilton Decorating.

Q. And do you know whether or not they got bids on various items? A. It was my understanding they did on several items at least.

Q. Do you regard the amounts that you paid for the services rendered to be fair and reasonable, that is with reference to all of these bills? A. I certainly thought they were the cheapest I could get.

* * * * *

153

CROSS EXAMINATION

BY MR. FRIEDMAN:

* * * * *

157 Q. No, my question, Mr. Ash, is simply this: What damage or defect occurred to the existing fixtures which you replaced here in Plaintiff's Exhibit 46 which I have just read? A. Mr. Friedman, it is my understanding that under the new code that you couldn't be tied into new plumbing, new pipes. I don't know.

Q. Are you able to state whether any damage or defect occurred to the existing fixtures which these replaced? A. I doubt if there was anything except that I couldn't use them.

Q. Now this cutting up of the tile floor, the second item on Plaintiff's Exhibit 46, relates only to the tile floor and wall on the third floor? Is that correct? A. That is right.

Q. Now I show you Mr. Ash, Plaintiff's Exhibit 42, which is a statement from the Hamilton Decorating Company. The first item reads: Repair walls and put up marlite boards in first, second, and third floor toilets.

Will you tell us what they consist of, sir? A. Yes. The ceramic tile on the third floor and the plaster on the second, and the first and second floor lavatories began to fall off due to the lateral cracks in the walls, and I was advised that the cheapest way to repair it and best way to repair it instead of replastering and attempting to put the
158 new ceramic tile in was to put this china stuff they call marlite in.

Q. These bathrooms described here did not have boards prior to the happening of this incident? A. Well, the third floor had ceramic tile, both the floor and the walls. The second floor had ceramic tile up about 4 feet, I would say, and plaster above. The first floor had plaster all the way.

Q. And none of these bathrooms prior to this accident had boards or paneling in the bathrooms? A. Oh, no.

Q. And did I understand you to say the plaster showed cracks in these bathrooms? A. Well the plaster was falling off.

Q. On the walls and the ceilings or just the walls? A. Both.

Q. Did you replace the ceilings of these bathrooms? A. Yes.

Q. With what? A. The same material, marlite boards.

Q. Marlite boards? A. Yes.

Q. Are you able to tell us why this statement says, only repair walls and put up marlite boards? A. No, the marlites are in the ceiling.
159

Q. The marlites are in the ceilings as well as the walls? A. Sure.

Q. You have an item plastering to Sullivan \$83.50? Is that the same Sullivan that did the other plastering work for you? A. I know Sullivan was a plasterer contractor and he did work there.

Q. You say Sullivan did plastering work there? A. Yes.

Q. As well as Hamilton? A. I know he was in the building. Apparently he did plastering.

Q. Now this item repair front door and general carpenter work on Plaintiff's Exhibit 42, can you tell me what that was all about, sir? A. Well pretty near every door in the building got out of whack and for

some reason or another he mentioned this front door and I know some time in the proceeding they had to take the weather stripping off because the door wouldn't close.

Q. You are speaking now of the front door? A. Yes, the front door.

Q. What is the general carpenter work referred to in Plaintiff's Exhibit No. 42, sir? A. I can't tell you. I have no idea. There was no extensive carpenter work.

160 Q. I beg your pardon? A. I have no idea. There was no extensive carpenter work.

Q. Are you able to tell us how this bill of \$1130.45 was broken down? A. No, I cannot.

Q. Let me ask you, Mr. Ash: These walls and ceilings in the bathrooms that we just discussed with respect to marlite boards, where are they located in the building? A. They are all located just to the north of the stairwall. In other words, there is a front room, a middle room, and then the stair well and then these lavatories.

Q. Well you will have to orient me with respect to the stair wall, sir. Is the stair wall east or west wall? A. Well the stair well, I am sorry.

Q. The stair well? I am sorry. A. The stair well.

Q. The stair well is it joined or immediately adjacent to the east wall or the west wall of the building? A. The west wall of the building.

Q. That is the wall opposite from where the work was done?

A. That is right.

161 Q. And these bathrooms were next to the west wall opposite the wall where this work had been done? A. That is right.

Q. That is with respect to 1919 Eye Street? Is that right?

A. That's right.

Q. You have stated you acquired the building in approximately -- in 1954? A. Yes, I bought it -- the sale was closed July 2, 1954.

Q. Now between July 2, the time you acquired the building, July 1954, and July 1959, had you done any extensive plastering work

in this building? A. No. There is one thing I want to qualify. In June 1959, we had a rather messy plastering situation.

Q. Will you please tell us what that was all about? A. Yes, they were demolishing the building.

Q. Which building are you referring to? A. The building of your client.

Q. At 1919? A. 1919. The people demolishing it knocked a big hole through the party wall into my personal office.

Q. And that would be the east wall, sir, of your place? A. Yes, that is right.

Q. Will you continue? A. Well as I said, there was a lot of dust and inconvenienced me a lot but they did repair it, whoever did the demolishing work they came and repaired it.

162 Q. How big a hole was it? A. This big, I would say.

Q. Could you see through it? A. Yes.

Q. Anything else? A. That is the only plastering work that I have any recollection of. I am quite sure none was done.

Q. Do you know, sir, to your knowledge, when it was, when prior to 1954, the building was plastered? A. I have no way of knowing.

Q. Do you have any idea the age of this building, sir? A. I am informed it was probably built somewhere around 1910 and 1915.

Q. Did you say 1910 or 1915? A. Yes, sir.

Q. So in redecorating, the redecorating work that you described as having been installed shortly after you acquired the building was in the nature of painting and papering? A. No. I can say all they did was to clean up and do some work like that but I have no recollection of any plastering.

Q. Mr. Ash, were any portions of the east wall of your building paneled prior to July 29, 1959 or July 28, 1959? A. What do you mean by paneling?

Q. Can you tell us what kind of walls the interior walls consisted

of? A. They were either painted or papered.

163 Q. Were there any panelings covering the inside walls? Wood panels, such as you see in this court room or similar to it? A. Oh, no. No. In the vestibule or the entrance of the building there is some paneling but that is all.

Q. And how about the basement? A. There is none there.

Q. Showing you Plaintiff's Exhibit 43, the bill of A. W. Lee for plastering, which reads: Repairing and replacing plaster and installing ceiling tile. Can you tell us, sir, in what rooms of your building this work was done? A. I believe it was done in -- well I will put it this way: Due to the lateral cracks plaster was falling off all over the building. And I was advised that the cheapest way to repair was to do what I did.

Q. Mr. Ash, my question is, sir. Do you know what rooms of the building this plaster work was done in? A. Oh, yes, that was in all rooms of the building. That is the first, the middle, and the back room of the first floor, the second floor, the third floor, and in the hall on the first floor, and on the third floor.

Q. Were these limited to repairs or did that replace the entire plastering work? A. I did not replace the plaster in the ceilings, that would have been an expensive item and we didn't do it.

164 Q. Did he replace any of the walls, sir, of these rooms of plaster? A. He repaired walls.

Q. Did he replace any of the plaster walls? A. Well, whatever you call repairing, if the plaster was off we put it back. Now where he did it or Sullivan did it or Hamilton did it, I can't tell you, but someone did it.

Q. Perhaps I do not make myself clear, Mr. Ash. What I mean by replacing -- were any walls in their entirety, that is plaster removed and entirely replaced? A. I do not believe so, Mr. Friedman.

Q. Were any ceilings removed insofar as plaster is concerned and replaced? A. I don't think so. I think they put this tile over the plaster to hold it up.

Q. The tile in the ceiling were put in? A. Yes.

Q. So that if I understand you correctly, the bill you have before you now refers only to repairs of plaster? A. I think that is true, yes.

Q. Is there any doubt about it, 'sir? A. It couldn't be anything else. If we have a big piece of plaster out of the wall, I do not know whether it is repairing or replacing.

165 Q. Now can you tell me what room you had the acoustical tile installed, in the ceilings is that right? A. Yes, in the ceilings. The acoustical tile is in the hall of the first floor.

Q. That consists of how many rooms? A. Of the hall of the first floor, the three rooms on the first floor; the three rooms on the second floor; and three rooms on the third floor.

Q. Do you know what kind of acoustical tile this was? A. I haven't the slightest idea.

Q. Do you know how it was installed? A. No.

Q. In what rooms had the plaster, the ceiling plaster been repaired? Were there any? A. I don't think there were any, Mr. Friedman.

Q. So if I understand you substantially all the ceilings in the entire building were re-done in acoustical tile? A. Yes, because the plaster was all loose and falling off.

Q. I understand. You told us that. But they were replaced with acoustical tile entirely? A. That's right.

Q. Were any of the walls in the building exclusive of the toilets or bathrooms that we mentioned before paneled? A. No.

166 Q. All of this was limited strictly to repairing of plaster?

A. That's right.

Q. Now I believe you testified from your Exhibit 47 that you had installed rubber tile in the two baths, on the first floor and third floor? Is that right? A. That is correct.

Q. Do you know what kind of tile -- this is floors? Is that right? A. That's right.

Q. Do you know what kind of floors were in there prior to July 1959? A. No. On the third floor there was a ceramic tile floor which started breaking up and we replaced it with this rubber tile. The question was as to the second floor?

Q. No, the first floor and the third floor? A. On the first floor asphalt tile originally and that started cracking and we replaced it with the rubber tile.

Q. Is this asphalt tile in squares or blocks or one complete?
A. Squares.

Q. Squares? A. Yes.

Q. Do you know when that was installed in the building? A. I believe when the building was redone in 1954.

167 Q. So the floor was then approximately five years old in July 1959? A. That is right.

Q. Now did the floor have a rubber coves on the first floor of the two baths on the first floor and second floor? Did they have rubber coves prior to July 1959? A. Of course, I know the ceramic tile one didn't. I have no recollection of whether the first floor did. I doubt it.

Q. This item is billed to you as an extra by Standard Floors, according to your statement, Plaintiff's Exhibit No. 47? A. Yes.

Q. That was something you asked for after they had installed the rubber tile in the two bathrooms? A. This is something of kinda a baseboard affair like this shoe along in here.

Q. But these were not in there before July 1959? A. No, they weren't.

Q. Now you mentioned Mr. Ash that you were advised that it would be just as cheap or perhaps cheaper to install acoustical tile in the ceilings rather than repairing the plaster. Who told you that?

A. Well I know that the Hamilton Decorating people did Mr. Mahara's and I believe that corroborated by somebody else. By Lee or someone.

168 Q. Did you get compared bids for both repair of the plaster and installation of acoustical tile in the ceilings, Mr. Ash? A. I have no recollection, no.

Q. You don't know of your own knowledge then what difference in the costs were at that time? A. All I know is the statement.

* * * * *

173

JAMES W. HARRIS

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined and testified as follows:

[DIRECT EXAMINATION]

BY MR. PECHACEK:

* * * * *

174 Q. And where are you employed? A. 14th and E, District Building.

Q. And in what capacity? A. Licenses and inspection construction section.

Q. And will you briefly describe to the Court the nature of your duties in that employment? A. Well, we take care of all construction, new, old, raising of buildings from the footings clear on until the building is completed.

Q. Directing your attention to the building that is located at 1919 Eye Street, Northwest, did you have an occasion during its construction to inspect that property? A. Yes, I did.

Q. Do you specifically recall the difficulties that occurred on or about the 28th of July 1959 at that location? A. Well as well as I can remember that has been quite awhile ago, but they started excavating there the week before that and during that week they started to under pin which the plans didn't call for it.

Q. Now prior to -- oh, no, do you recall being called? A. I was called, yes, that morning around 9:00 from someone working in the building saying the building had started to crack.

Q. As a result of that call did you go to the premises? A. I went there immediately.

175 Q. Will you tell us what you saw there? A. Well they had started to under pin the building, and we walked on the inside and the plaster started to crack so my boss immediately called the District

Building and told them that we had to have people come out.

MR. PECHACEK: Would Your Honor indulge me for just a moment.

Q. Prior to the 28th of July 1959, Mr. Harris, when had you last inspected this property before the 28th? A. I was there the day before.

Q. And I will show you what has been marked for identification as Plaintiff's Exhibit 4, 5, and 6, and ask you to look at these photographs if you will.

Now referring to those photographs on the 27th when you made your inspection of this property, was the excavation in the condition that it appears to be in those photographs? A. No, it isn't.

Q. Will you tell the Court what the difference was or what the condition of the excavation was on the 27th that is different from those photographs? A. Well there wasn't any of these holes dug in underneath these buildings the day before. That is these right here and these down here. On neither side of the building was neither one of those holes been dug there.

Q. Now will you please tell the Court or describe for us what these mounds of earth appear to be in the photograph alongside the
176 walls? A. What do you mean by that?

Q. Can you describe these mounds of dirt that are adjacent immediately to the walls? A. Well these are holes. These holes were dug out underneath these extension buildings which it wasn't supposed to be. This mound here of dirt was supposed to be cut to a 1 to 1. And it was 3 feet deep and it wasn't meant that way.

Q. These mounds of dirt, what condition were they in the day preceding this? A. Well there wasn't any of these holes dug in under here. It was all a solid mound of dirt right around the building.

Q. I see. On the 28th when you arrived, you say, at the property, did you have an occasion to then make an investigation of the condition that the adjoining buildings were in? A. Yes, I did. I went in both buildings on each side of 1919. That would be 1917 and 1921.

Q. And as a result of your investigation, what did you find?

A. We found 1917 very badly cracked.

Q. And were there any exterior cracks appearing in 1917? A. A little bit right at the time, on the bay window on the front of it.

Q. Did you have occasion to tape any of those cracks? A. Yes, we did. We taped them all that day.

177 Q. Showing you Mr. Harris what is marked as Plaintiff's Exhibits 7 and 8, and ask you if you were present -- well, first of all can you describe what those two pictures reflect insofar as the condition of the properties are? A. Well this is a front wall of 1917 where I think they dug out and a big piece of the brick wall fell out afterwards.

Q. Were you present at the time that fell out? A. Yes, I was.

Q. Well what happened at that time that large section fell away from the brick work? A. As well as I could see at the time this bay window on here, it snapped these headers in here and then it started to open up a crack in between the bay window and the front of the building.

* * * * *

178 Q. * * * Did you have an occasion on your arrival on the 28th to discuss what had taken place with anybody there? A. Well I asked the superintendent on the job, how come he to start underpinning the building.

Q. This superintendent was employed by Lesmark: Is that correct? A. Yes, he was there and he told me --.

Q. Do you recall his name? A. Not right off hand.

Q. Can you tell us what he told you? A. Well he said it was usual practice, that he thought the building should be underpinned.

Q. Well do you know whether or not the plans called for underpinning? A. The plans did not call for no underpinning at the time.

* * * * *

179

CROSS EXAMINATION

BY MR. EDGERTON:

* * * * *

181 Q. Now Mr. Harris, you are perfectly clear that there were no cracks in either of the adjacent buildings on the day, July 27th, when you were there? A. As far as I know there wasn't.

Q. You saw no cracks?

182 And this seemed like where you have described the fact that on the 27th the excavation cited appeared as exactly as it did in the photographs with the exceptions of these holes? Is that right? A. That's right, yes, sir.

Q. Do you remember what time of day it was on July the 28th, when you went, after you had received the call there was some trouble? A. It was in the morning, I would say, somewhere around 9:00 o'clock.

Q. Around 9:00 o'clock? Is it proper to assume then Mr. Harris, judging from your observations of this job, that these holes that you have described were dug some time between the start of work on July 28th at about 7:30 A.M. and 9:00 when you saw them? A. Yes, sir, that is when they were dug. It was approximately 9:30.

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CROSS EXAMINATION

BY MR. FRIEDMAN:

* * * * *

188 Q. Mr. Harris, I show you what has been marked Plaintiff's Exhibit No. 52, which appears to be an official set of plans for the premises at 1919 Eye Street, Northwest, the very place here under discussion.

And I show you the point to the adjoining wall on page 3 of drawing 3, and ask you are these the kind of footings that were on the adjoining walls at 1917 and 1921 Eye Street? A. I don't recall. I don't recall

189 whether that was the exact kind of footings or not, sir.

Q. Well, looking at this plan they do show footings for both adjoining walls at 1917 and 1921, do they not? A. Yes.

* * * * *

Q. Actually, as a matter of fact, Mr. Harris, is it not a fact, is it not true, that there were no footings as such on the walls of

1917 Eye Street, Northwest on July 27th, 1959? A. I don't recall right at the present.

Q. Beg your pardon? A. I don't recall right at the present.

190 Q. You don't recall whether there were or were not? A. No, I do not.

Q. What can you tell us about footing at 1921 Eye Street, Northwest, on July 27th? Were they there or were they not? A. I don't remember that.

Q. Would your records show whether there were footings on 1917 or 1921 Eye Street? A. No, they would not.

Q. Wouldn't your records show that at all? A. No.

Q. At least your records consisting of the plans which were on file at 1919 Eye Street show footings for the walls of 1917 and 1921 Eye Street?

THE COURT: I believe this is repetitious. This is substantially the same question you asked the witness about Plaintiff's Exhibit 52.

* * * * *
MR. FRIEDMAN:

196 Q. Showing you Plaintiff's 4, 5, and 6, which are photographs, I believe they have been identified as photographs of the condition on the job site during the course of the excavation or upon the completion of the excavation. And you mentioned the holes underneath the adjoining walls of 1917 Eye Street? Right? A. Yes.

Q. What is wrong with those excavations? A. These weren't showed on the plans which were filed in the District Building.

* * * * *

197 Q. When you appeared on the site on the morning of July 28th, what inspection, if any, did you make of the adjoining building? A. I went on the inside and saw the big cracks in the plaster.

Q. Where? A. I don't recall which floors right now.

Q. Do you recall which building it was? A. 1917 Eye Street.

Q. Did you examine the exterior of the walls of 1917 Eye Street?
A. Yes.

Q. Did you find anything there? A. There was some small cracks down on the front of the bay window where the bay window goes on to the building.

Q. Anything else in the exterior walls? A. I don't recall.

Q. Did you find any cracks in the exterior walls at 1921 Eye Street? A. I don't recall that.

Q. Did you go into 1921 Eye Street? A. Some time during the day.

Q. What did you find there, if anything? A. We found some small cracks in the plaster of that building.

Q. Where? In what plaster? A. I don't recall which floors they were on.

Q. Did you make a written report of what you found in those buildings that day? A. Yes, I did.

Q. May I see that please? A. I think you have it.

Q. Is that the paper I took from you before the recess? This memorandum you referred to? Is this it? A. Yes, it is.

Q. And what are you referring to here, sir? Is this a copy of it? A. That's right.

Q. Do you have some notes underneath attached to this copy? A. Just where I wrote it up and the girl typed it.

MR. FRIEDMAN: May I have Your Honor's indulgence for a minute.

THE DEPUTY CLERK: Defendant Lesmark's Exhibit No. 4 for Identification. (Document marked for identification).

Q. Showing you Defendant Lesmark's Exhibit No. 4 for Identification, that was your memorandum to Mr. Dripps, the superintendent of the Inspection Division? Right? A. Yes.

Q. Now do you say any place in that memorandum or describe in that memorandum any damage or defects which you found at 1917 or 1921 Eye Street? I am referring now to Defendant Lesmark's 4 for Identification. Take a look at it. Can you answer the question?

A. No, there wasn't anything in this letter at all.

* * * * *

MR. FRIEDMAN: May I have Your Honor's indulgence, please.

Q. You yourself made no report in writing at least on July 28th with regard to any defects or damage that had been caused to either 1917 or 1921 Eye Street? A. My chief was with me and Mr. Boreman wrote the record.

* * * * *

200

CROSS EXAMINATION

BY MR. CHANNING:

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Q. Now can you tell me Mr. Harris, whether a permit from the District of Columbia Government is requested before a builder can excavate or dig under a building for the purpose of underpinning?

A. A permit is to be issued before they start to excavate.

203

Q. And had any such permit been issued in this particular case?

A. The permit was issued on 7-17-59.

Q. And did that permit indicate any underpinning was to be done?

A. That permit did not call for any underpinning.

* * * * *

CROSS EXAMINATION

BY MR. EDGERTON:

Q. Sorry Mr. Harris, but would you refer to any record that you had of your inspection or trip to the job on July 27th, I think when you were asked something about that trip that you produced something in response to the question that referred to it. Do you have that paper?

A. Yes, I do.

Q. What does it state? A. Excavation approximately 3 feet below the existing building.

Q. What is the paper itself? A. It is a permit that was issued for the construction of the new building.

* * * * *

206

WILLIAM EVAN DRIPPS

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

Q. By whom are you employed? A. The Government of the District of Columbia.

Q. What is your present position with the District of Columbia Government? A. I am superintendent of the Inspection Division, Department of Licenses and Inspection.

* * * * *

212 Q. What did you find after you arrived at the scene? A. We proceeded to make an inspection of the site and the two adjoining buildings.

Q. Would you indicate what you observed? A. I found that the party wall between 1917 and 1919 -- excuse me Your Honor -- may I refer to this report and quote a portion from it?

THE COURT: You may.

A. The party wall between 1917 and 1919 showed two severe openings 3/4" to 1" in diagonal cracks in the front portion of the first story. In the second story front portion similar but less severe cracks were found. Small cracks like those found in the first and second stories were located in the third story.

Inspection of the party wall between 1919 and 1921 showed several areas on the first, second, and third floors were small, 1/14 to 1/16
213 cracks in the plaster applied to the party wall. No cracks were noticed on the exposed side of the party wall.

* * * * *

215 Q. Now what did the plans call for with reference to excavations under the walls themselves? A. May I see the plans, please?

Q. Mr. Dripps, I hand you Plaintiff's 52. A. The plans indicate

no excavation under the party walls.

Q. In other words, were these pits that were dug under the party walls, would that have violated the plans? A. They were not authorized by the plans or by the approved plans.

Q. Now in order for this building or these buildings to have been underpinned, what would have been required under the building regulations and under these plans as approved? A. The building code
216 would require that adequate precautions be taken to prevent any structural damage or failure to the adjoining buildings. I could not say that the code gave precise conditions as to just how and what detail measurements were to be taken.

Q. Mr. Dripps, I was thinking more of the procedure that would have been required before the contractor would have been authorized to underpin the building. A. He would have been required to submit plans and drawings for a complete description of the work so that the engineering planning examiner could have reviewed them and determined their adequacy.

Q. And would those plans have to be approved before he could undertake to underpin? A. Yes.

Q. And do you know whether or not as a fact any other plans were submitted calling for underpinning of these walls? A. None were submitted prior to July 28th.

* * * * *

218 Q. Now Mr. Dripps, approximately how long were you on the premises that morning? A. According to the report, I have no personal recollection, but according to my report, I must have left the site shortly after noon.

Q. And during the time you were on the site what actions did you take with reference to securing the buildings? A. I directed that the holes under the party walls be filled with concrete as expeditiously as possible and that bracing be placed across the excavation from party wall to party wall.

Q. And to whom did you give those directions? A. Those directions were given to the contractor; the contractor for the building at 1919.

219 Q. Do you know whether or not those directions were complied with? A. Yes, they were eventually complied with.

Q. Do you know what happened with reference to the occupancy of the building of 1917 Eye Street? A. When I arrived the occupants were already vacating the premises.

Q. Upon whose request or authority was that done? A. This was done upon my request to the inspector on the job.

Q. Now then Mr. Dripps with reference to the building itself, that is 1917 and 1921, did you see any movement of the walls at all? A. Oh, yes.

Q. Would you describe what you saw? Let us take one building at a time. Let us take 1917 first. A. In 1917 the party wall showed evidence of general downward and possibly upward movement. This was evidenced by fairly wide cracks, as much as 1" opening in the front portion of the first story. Less severe cracks on the second floor, and smaller cracks in the third floor story.

Q. Mr. Dripps, when you refer to that large crack, is that the one that is visible in Plaintiff's Exhibit 2? A. That is one of the cracks. There were others that were apparently in the inside of the
220 building.

Q. And what did you do, if anything, with reference to marking those cracks? A. Gummed paper labels were affixed to many of them to determine if movement was still going on there and how long it would continue.

Q. And following that did your further observations indicate additional movements of the walls? A. Yes.

Q. Which walls and to what extent? A. The party wall had continued to go down and the front wall of 1917 had moved upward toward the street.

223

CROSS EXAMINATION

BY MR. FRIEDMAN:

Q. Do I understand your testimony to be, Mr. Dripps, that you examined the exterior walls of 1921 Eye Street and found no further damage to them? A. My testimony was, I believe, that I found no
224 cracks in the exterior wall, in the outer wall.

Q. Did you examine the front wall of 1921 Eye Street, that is the wall facing Eye Street? A. Yes.

Q. Did you find any cracks there? A. According to my report, no.

Q. You went inside the building of 1921 Eye Street? A. Yes, I did.

Q. On this day of July 28 or 29, 1959, whenever it was? A. Yes.

Q. And what did you find there, sir? A. I found that certain cracks had occurred in the party wall as evidenced by their showing up in the plaster.

Q. You saw some cracks in the plaster on the interior of the party wall of 1921 Eye Street? A. I will read this inspector's report again. The inspection of the west party wall between 1919 and 1921 showed several areas on the first, second, and third floors of small, 1/4 to 1/16 of an inch cracks applied to the party wall. No cracks were noticed on the exposed side of the party wall.

Q. Were you able to ascertain whether this plaster was plaster which had been placed directly on the interior of the party wall of 1921 Eye Street? A. I am sorry; I can't remember.

225 Q. You don't recall whether there was any lathe material between the plaster and the party wall? A. No, I do not recall.

Q. And was that the extent of your findings at 1921 Eye Street, that which you have just read? A. That is all I have a written record of, yes, sir.

Q. Now Mr. Dripps, I believe you were asked a question about the revised plans. Do you have them there? The plans which were

submitted after July 28th? A. I have some plans which were submitted subsequent to July 28th.

Q. Will you find those for me, please, and will you hand those to me? A. There are two sets of plans here.

Q. Were they submitted at different times? A. Yes, they were.

Q. By whom? A. The signature appearing on this application, this is one dated August 6, 1959 executed by the agent, E. W. Dreyfuss.

Q. He was the architect for the owner? A. That is correct.

Q. Now were these the first revised plans that were submitted to your office? A. I don't remember now.

Q. What is the date of the second reference that you made to revised plans? A. The application is dated September 15, 1959.

226 Q. And by whom was that one submitted? A. This was submitted by Mr. Dreyfuss as agent for the owner.

MR. FRIEDMAN: May I have this marked for identification, please?

THE DEPUTY CLERK: Defendant Lesmark's Exhibit No. 6 of Identification.

(Document marked for identification.)

MR. FRIEDMAN: Perhaps we better make them 6 and 7 Your Honor, because they appear to be separate. One is the application and the other is the plan.

THE COURT: This is August 6th? Is that correct, madam clerk?

THE DEPUTY CLERK: Yes, Your Honor six is the first one, the application. This is marked No. 7 for identification.

THE COURT: No. 7 is the second application?

MR. FRIEDMAN: No, that is the plan in connection with that August 6th application, Your Honor.

Q. Now referring to the plan, Defendant Lesmark's Exhibit No. 7 for identification, Mr. Dripps, will you look at it and tell us how and in what respect, if any, they differ from the original plans submitted for which a permit was issued on the construction of 1919 Eye Street.

MR. PECHACEK: Your Honor please, I object to this and the purpose of my objection is, that anything that occurred after the alleged damage, if, in fact, it were to correct the situation, is not admissible
227 unless it is tied in by some professional testimony, that this is how it should have been done originally, Your Honor, in the first place.

MR. FRIEDMAN: Well, we hope to tie that up, Your Honor.

THE COURT: I will overrule the objection subsequent to an affirmative showing that "it ties it up."

Read the pending question, madam reporter.

(The reporter read the pending question.)

A. The revised plan shows that the excavation which had been made to accommodate the basement was to be filled in solidly with concrete.

Q. And the original plan showed what in that respect? A. The original plan showed an arrangement for a basement which would come away from the two party walls, a step arrangement.

Q. Was this concrete that was required in connection with this revised plan which was approved, to stabilize the soil, sir? A. It was to stabilize the entire excavation so it would not move further.

Q. You have described the soil as being loose uncemented sand. Do you know what the propensities of that kind of soil is or are? A. I am very much afraid, sir, that question is so general that I --

228 MR. FRIEDMAN: Let me rephrase that.

Q. When you say the soil was loose, uncemented sand, can you give us a more detailed description of the kind of soil which you found?

A. Well in layman's terms it is very much similar to the sand you would put in a child's play box. It flows easily and will not stand by itself.

Q. Would you say that kind of soil does not have good, root bearing qualities? A. Under proper circumstances it has excellent root bearing qualities.

Q. What do you mean by proper circumstances? A. We are

getting into engineering. It happens that I am a professional engineer but also being a District official, I must stay out of the engineering business. I take it you qualified the answer to the question, should I answered it as an official.

Q. You say under certain conditions it would have. Now can you tell me what conditions you are describing? A. If the sand were confined so that it could not flow lightly then it would have excellent root bearing capacity.

Q. Now you mentioned there was an application for revised plans in September of 1959? A. Yes.

Q. Do you have those, sir? A. Yes, I do.

229 MR. FRIEDMAN: May I have these marked for identification, please.

THE DEPUTY CLERK: Defendant Lesmark's 8 for identification. Defendant Lesmark's 9 for identification.

(Documents marked for identification.)

MR. FRIEDMAN: No. 8 which would be the application, Your Honor. And No. 9 would be the plan submitted in connection with that application.

Q. Can you tell me, Mr. Dripps how and in what manner, Defendant Lesmark's Numbers 8 and 9 for identification differ from 6 and 7, the first sets submitted in August of 1959?

MR. CHANNING: The same objection.

THE COURT: The objection is overruled subject to the same limitation.

A. The plan of September 15 is for something different from the August plan. This plan shows a method of bracing the two party walls involved and the front wall of 1917.

Q. Bracing in what manner, Mr. Dripps? A. By means of structures and shores between the party walls and by means of shores to the ground there in front of 1917.

Q. Now both of these plans, that is the one in August, August 6

and September which you just referred to were submitted or prepared by Mr. Dreyfuss? A. They were prepared by Mr. Dreyfuss.

230 Q. And submitted to your office as agent of the owner? A. Yes, sir.

Q. Were they both approved there on the appearance of them? A. Yes.

Q. Now Mr. Dripps will you kindly pick up that set of plans for the building, Plaintiff's Exhibit No. 52, which you have before you, and turn to page 2 of 3, will you tell me, sir, whether on that page appears some descriptive legend or drawing showing the footings for the building of construction of 1919 Eye Street? A. Yes, it does, the drawings do indicate footings.

Q. Will you tell me what is indicated with respect to footings there shown? A. Well there is a continuous footing shown under the front or rear wall. Also there is a footing shown under the step wall for the basement.

Q. Now tell me, Mr. Dripps, if that plan or that page of those plans, show a footing in existence in the party wall of 1917 Eye Street? And I direct your attention to the upper right hand corner of that page.

THE COURT: Just a minute. Will you read the question, madam reporter.

(The reporter read the pending question.)

A. Yes, the drawings show a footing.

231 Q. What kind of footing does that plan show? A. It does not indicate. Excuse me, do you mean the material of the footing?

Q. No, not the material. What kind of shape and form? A. Oh, what we call a continuous footing.

Q. Does that footing appear to be larger than the wall per se, the party wall of 1917 Eye Street? A. Yes, sir.

Q. That plan is drawn to scale, is it now, sir? A. Yes, sir.

Q. What scale does the footing show the dimensions to be as a projection beyond the party wall itself? A. There is a dimension which

comes close to approximately 6 inches. I am not sure that dimension is intended to indicate the extension of the footing but apparently the footing is shown to extend about 6 inches.

Q. Does that conform to the scale of that drawing? A. I have no idea. I do not have the scale with me.

Q. Now directing your attention to the same page, to the left hand side, the upper portion thereof, there is a long sectional drawing?

A. Do you mean the plan of the basement?

Q. Yes. The upper part, do you see that? A. Yes.

232 Q. Are there indications there for footings for the 1919 Eye Street building? A. Yes.

Q. How many of them on the side immediately adjacent to 1917 Eye Street? Going from front to back? A. Under the step wall in the basement there is a continuous footing which runs from front to back. There are indications not on the plan but on the detail, which are the sheets, for the footings under each of the columns.

Q. And what size would those footings be under each of the columns? A. Let me see. Under certain of the columns 3 feet, six inches, and under certain others, two foot, six inches.

Q. Would that be three foot six or two foot six square? A. This would be my assumption, yes, in the absence of any other information.

Q. Now tell me, Mr. Dripps, if you will, whether these columns are immediately adjacent to and in contact with the party wall at 1917 Eye Street? A. Two of them are.

Q. Which two? A. Numbers 3 and 4.

Q. Do you know what the distance is between those two? A. Fifteen feet.

233 Q. Now in order to prepare for those footings or columns, what must the contractor do in the way of excavation, sir? In the way of excavating for those columns? A. He has to take out whatever dirt or soil is there so that he can get the footing in.

Q. Right up to the party wall of 1917 Eye Street? Isn't that so? A. And that is what it shows.

Q. And below the wall of 1917 Eye Street? Isn't that what is shown?

A. That is not indicated.

Q. What is indicated with respect to the depth of the wall or footings of 1919? And you may refer to the sectional drawing on the same page, sir. A. With a depth from the floor level to the top of the column, to the bottom of the footing, would be 4'2" or 5'2" for both of those columns.

Q. 5'2" from where to where, Mr. Dripps? A. According to the drawing it would be from the upper level to the basement.

Q. And how far below, if at all, does that 5'2" go below the bottom of the party wall of 1917 Eye Street? A. I don't know.

Q. Does the drawing indicate? A. The drawing does not indicate by means of dimensions.

234 Q. Does it indicate by means of scale? A. I would not take it that way. There is an indication of a party wall footing here but I would not scale it. It is common practice to indicate an existing party wall but without prior examination you cannot tell where the footing is.

Q. According to that drawing where would the footing of the party wall be at 1917 Eye Street with respect to this 5'2" depth of the column immediately adjoining that party wall? A. If this were to be interpreted literally it would show the column footing would be below.

Q. How far below, approximately? A. I have no way of telling.

Q. Can you scale it from the scale that is shown on that plan?

A. That could be done. I do not have the scale.

Q. Let me hand you the scale and ask you to go over it and take a dimension and give me your approximate measurements, sir?

A. It would indicate approximately a 3' difference.

* * * * *

235 A. It is a common practice in the construction industry here to indicate the existence of the adjoining buildings only as a matter of information. No dimensions are placed on this part of the drawing. They are simply shown for the general information. They are not, at least that is the understanding of our department, they are not to

be taken as literal construction or as literal dimensions.

* * * * *

Q. Now in digging this hole or making this excavation for these columns to support 1919 Eye Street, immediately adjacent and adjoining the party wall, and below the party wall of 1917 Eye Street, the excavation would have to continue down below the party wall? Right?

A. If the party wall terminated above the party wall, yes, sir.

* * * * *

236 Q. Showing you Plaintiff's Exhibit No. 4, with respect to the apparent excavating underneath the party wall of 1917 Eye Street, would you say these are approximately at the places where the plans, Plaintiff's Exhibit No. 52, showed the columns were to be installed?

A. No.

Q. Why not? A. The plans show two columns, and I see 1, 2, 3, and 4 holes.

Q. But the four holes included one in the front and one in the back, don't they? A. No.

* * * * *

238 Q. I show you Plaintiff's Exhibit No. 6 and ask you to compare this to the plan on page 2 of 3 of Plaintiff's No. 52, and tell me how that corresponds with respect to the excavation for the columns, and the footings of the construction of 1919 Eye Street? A. All right. The plan indicates there are two column footings dug right next to the party wall. I have no way of comparing the elevation from the photographs to those which are indicated by a reading of the plan. So I cannot tell whether these holes are above or below or at the level of the footing.

However, the plan calls for two footings. This picture shows four holes under the party wall. The plan does not indicate that excavation is to go directly beneath the party wall and this photograph shows that the party wall has been excavated under.

* * * * *

239 Q. Now Mr. Dripps I believe you stated that you issued that letter as of --

THE COURT: July 29th.

Q. -- July 29th, that's right, calling upon the party to make the corrections and put the buildings back in the shape in which they were before the excavation occurred?

Did you follow up with to ascertain whether or not your instructions had been complied with in that respect? A. Yes.

Q. Were they done? A. It was eventually done, yes, sir.

Q. Do you know when it was, it was accomplished, or about what time, sir, if you can tell us? A. May I see the building permit with the original plans? The original permit?

240 Q. Do you mean the original permit for 1919? A. Yes. I need to see the permit itself.

Q. Is this what you referred to, Plaintiff's Exhibit 54? A. Yes. I would have to say that the corrections to the adjoining wall were made and completed insofar as the District of Columbia was concerned in April 1960.

* * * * *

CROSS EXAMINATION

BY MR. CHANNING:

241 Q. Mr. Dripps, several times you have mentioned that there was a stepped wall in the basement? A. Yes.

Q. Would you describe that for us? What do you mean by that?

A. Well the configuration of the basement would be such that you would come toward the center of 1919 Eye Street from each adjoining building, at a level which is shown to be somewhat above the assumed location of party wall footings, and in coming out for a distance of about 3'6", leveling it down approximately 3'6" to the lowest part of the floor and then across to the step on the other side.

Q. Would that step wall, does that plan to run the entire length of the basement? A. Yes.

Q. And were the only places that construction in any way touched the party walls be the places where the columns were to be built?

A. The two columns on each side and the front and back wall -- just one moment -- no, the columns and front and back wall.

Q. Now the plans do not indicate in any place, do they, that any of the column footings were to extend under the party walls? Is that correct? A. No, they do not.

* * * * *

243

GEORGE R. WATSON

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined, and testified as follows:

244

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

Q. And by whom are you employed? A. J. W. Conway, Inc., 2001 Hamilton Street, Hyattsville, Maryland.

* * * * *

Q. Did there come a time while you were employed with J. W. Conway, Inc., that you were called upon to do some work for Mr. Ash? A. Yes, I was.

Q. I show you Plaintiff's Exhibit 45 and ask you if you can identify this for me? A. Yes, sir.

Q. What is it, sir? A. This is a bill for the roof work that was done at 1921 Eye Street, Northwest.

Q. And what other work? A. Sheet metal work.

Q. Can you tell us what, if any, parts of that bill represent work labor done in connection with any damages to Mr. Ash's building?

A. Yes, on the east wall in the front in the main part it was damaged practically wholly.

245

Q. Is that section of your bill broken down? A. Yes, it is.

Q. How much was the work and the material for that repair work?

A. \$67.21.

Q. Is there anything else on that bill that was for work and labor that was required to be done to repair any damage to the building because of this accident? A. Well the second item says, install new galvanized iron wall cap.

Q. And what do you estimate the value of the work and labor to install this iron cap galvanized iron cap to be? A. To the best of my knowledge if I can remember, I would say it was approximately \$130.00.

Q. Are there any other items on that bill that were necessitated, that is, repairs were necessitated by damage to Mr. Ash's building? A. Not that I can definitely say, no, sir.

* * * * *

246

CROSS EXAMINATION

BY MR. FRIEDMAN:

* * * * *

247 Q. Were you present when that was done? A. No, sir.

Q. You don't know what condition it was found in? A. I know when I went up to examine the roof before the work, it was receding, that a portion of it was damaged -- how or why, I don't know.

248 Q. You don't know how much of it was damaged? A. No, sir.

Q. Do you know of your own personal knowledge how it was damaged? A. No, sir, I don't.

Q. Do you know approximately how long that wall cap had been in existence on that wall? A. No, sir.

Q. Could you tell by examining it? A. Not too well.

Q. In your judgment how old was that wall cap when you first saw it and examined it? A. I would say approximately twenty years old.

* * * * *

249 Q. Do you know with what material you covered the main wall?

A. I believe that the final covering was copper.

Q. Do you know what covering was there before you did your work? A. No, sir.

Q. You examined it, sir? A. There wasn't any covering on this lower section of the property when I went there.

Q. There was none? A. No.

Q. Do you know for how long that condition had existed? A. No, sir.

Q. How about the coupling? Do you know how long the coupling had been in existence prior to the inspection? A. No, sir.

Q. Do you know what condition it was in prior to the date it was inspected? A. Are you talking about the one on the main yard?

Q. Yes, sir? A. No, sir.

* * * * *

250

JAMES J. MADDEN

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. RAFFERTY:

* * * * *

Q. What occupation is that? A. I am a plumber contractor.

* * * * *

252

CROSS EXAMINATION

BY MR. FRIEDMAN:

* * * * *

253 Q. Do you know of your own personal knowledge, sir, what caused that leak? A. Oh, no. A lot of things could have caused it.

Q. Do you know of your own personal knowledge how old that iron pipe was that you removed or fixed? A. No, it could be as old as the
254 building, or it could be ten years old, or five years old. I wouldn't have any way of telling.

Q. Do you know how long that bath room floor had been in place prior to your inspection, if you can tell us? A. No, sir.

Q. When you say tile floor, do you mean strong tile? A. Ceramic tile.

Q. Ceramic tile? A. Yes.

Q. And was the same flooring replaced? A. Yes, but not by us.

Q. Not by you? A. Yes, sir.

Q. After you completed your work somebody replaced the same tile? A. No.

Q. You didn't damage it in removing it? A. We just damaged the part we took up.

Q. How much of it did you damage? Do you know? A. Up about two foot square over at the toilet there, and about a foot square over at the lavatory basin.

Q. Do you know which pipe was leaking, hot or cold pipes? A. The leak was on the 4" closet bin pit. The lead closet bin.

255 Q. Do you mean the water closet? A. The lead bin underneath the water closet as we call it in the plumbing business.

Q. Is that the leak in the pipe? A. Yes.

Q. There were no leaks in the hot and cold water pipes? A. There was some bad places in there but they weren't leaking.

Q. Do you mean they were worn? A. They were rusted so that they might leak at any time.

Q. Do you know how long they had been in place there? A. Oh, as I said, I don't know how old the building was. They might have been there when the building was put up. I wouldn't know.

Q. Do I understand that you replaced the hot and cold water lines with copper pipes and fixtures? A. That is right.

Q. That was because of what was rusted and deteriorated?
A. Yes, sir, that is right.

* * * * *

256

LAWRENCE E. GEHLEY

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

Q. By whom are you employed? A. Gott's Linoleum, Incorporated.

257 Q. Are you an officer of the company? A. Yes, sir.

Q. What office? A. Secretary-treasurer.

* * * * *

Q. What building does those records pertain to? A. 1917 Eye street, Northwest.

Q. Before I go any further, I should like to ask you, have you ever inspected the premises at 1917 Eye Street? A. Personally, I have not.

Q. Do you have any records with you with reference to the work that was done on that building? A. Yes, sir, I do.

258 Q. Now then would you indicate what the records show as to the work that was done? A. The original contract called for installation of floor covering in certain rooms in the building. Also, to install rubber treads on stairs, and to install risers on the stair treads. Contract lump sum broken down into three parts. One part of the contract calls for the installation of asphalt tile 9x9x1/8" to be installed in rooms that now have linoleum on the floors.

The price is included. Masonite underlying in two hallways. The amount of that portion of the work is \$510.00. The remaining of the contract calls for the installation of rubber treads on the stairs leading from the first to the fourth floor and asphalt tile on the landings. Amount \$445.00.

The third and last paragraph of the contract was to install rubber color to match treads on risers on stairs leading from the first to the fourth floors in the amount of \$90.00.

Q. Was there any other additional work there according to your records? A. There was one small additional amount of work done. It was for cleaning and waxing the floors in two rooms, and installing some cedar wood shoe moulding that amounted to \$38.75.

Q. Now, Mr. Gehley, what do your records show as to the need for the putting in of the asphalt tile on those rooms that had the linoleum on the floor? A. This information is taken from my estimator.

259 Q. By the way, who was the estimator? A. The estimator -- our estimator is Mr. Robert Mathews.

Q. Is he the one who made the estimate in this case? A. Yes, sir.

Q. Was this work done pursuant to a bid you submitted? A. Yes, sir.

Q. What do your records show with reference to the need for the work to replace the -- to recover the floors with the asphalt tile?

MR. FRIEDMAN: Your Honor please, I object to this because the witness has testified, I think that the --

THE COURT: I think the question as to what the record shows is a proper question under the circumstances of this case. I will overrule your objection. Go ahead.

Q. That the estimator there tells you? A. That the conditions of the floors are as follows: Strip wood floor. We are sanding the extra floor covering. We are to nail loose boards before installing new floor covering and we are to lay over the old existing material. There is one additional one. We are to install masonite in two hallways.

Q. And for that portion of the work what was your charge? A. That charge on that part of the work was \$510.00.

Q. Then I believe you testified you did the cleaning and waxing and applying the moulding and for that total amount, \$38.75? A. That is correct.

260 MR. PECHACEK: Your Honor, please, if I may refer back to Mrs. Fenton's testimony, those were the only items we claimed as being repair of damage.

THE COURT: The witness testified that she was not claiming the amount of \$445, for the damage of \$90.00.

Q. Did you do those other two jobs too? A. Yes, sir, we did.

Q. And approximately when did you, do your records show when that work was completed, Mr. Gehley? A. Ignoring the \$38.75 charge, the last day our men were on the job was February 25, 1960.

Q. Now what do you mean by ignoring the \$38.75 charge? When was that work done? A. The \$38.75 work charge was done on March 22, 1960.

Q. Do your records show whether or not you were paid for all of this work? A. They do. We were paid.

MR. PECHACEK: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. FRIEDMAN:

Q. Can you tell us whether or not you went and inspected this job before the work was done? A. I did not.

Q. You are unable to state then what the condition of the floors were or the stairs or the risers before you did this work? A. I am
261 unable to state the condition of the floors.

Q. I take it also that you are unable to state how old these floors were, the risers, or treads? How long they had been in place? Or, what the condition was before you did this work? A. Yes, I would have no way of telling that, sir.

Q. Do you know whether or not there were shoe mouldings in place there before you did this work? A. Yes, sir, there was shoe moulding in place.

Q. And do you know where you put this new shoe moulding?
A. Sir, in removing shoe moulding being nailed to the wall, our men have to remove it. Naturally, when you remove some moulding it is going to break and it is a natural condition on all jobs.

Q. Did you ever visit this premise yourself, Mr. Gehley? A. No, sir.

* * * * *

263

RAYMOND T. BERRY

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

* * * * *

Q. Where are you employed, Mr. Berry? A. Whiting Elevator Company, 1110 North 9th Street, Northwest.

* * * * *

264 Q. Did your company install the elevator in her building? A. Yes, sir.

Q. At 1917 Eye Street? A. Yes.

* * * * *

Q. After the installation was completed, did Whiting Company have a service contract with Mrs. Pryce? A. Yes, we did. It was monthly calls for oil, grease, adjust, checking floor levels, and examining the mechanical equipment to see if it was okay.

Q. Did you personally go out on these inspections? A. I don't personally. I follow up on the mechanics. I don't personally do the work.

265 Q. Do you make inspections yourself? A. Yes.

Q. Did you ever have an occasion to make inspections of Mrs. Pryce's elevator? A. I have a number of times.

Q. And for how long a period of time was this maintenance contract in effect? A. From the date of the installation right up until today.

Q. And are you acquainted with the accident that occurred to the building in July of 1959? A. Yes.

Q. And do your records show when you last made an inspection prior to that time? A. Our records probably would but I am not real positive just what time the accident actually occurred.

Q. The date, Mr. Berry, was July 28, 1959. A. Well I believe that we usually inspect about the middle of the month.

Q. Would you have inspected then on the 15th of July? A. Somewhere in there.

Q. Somewhere around the 15th of each month? A. Yes.

Q. Do you know the condition of Mrs. Pryce's elevator cables and equipment relating to the inspection as to the last inspection?

266 A. At that time it was all satisfactory. There was nothing wrong with it other than our regular service.

Q. After July 28, 1959, did you have an occasion to inspect the elevator in her building? A. Yes. We called there and noticed the condition of the wall and we were afraid it would have some effect on the elevator because the elevator was on that side. So we called the District inspector to come in and inspect and the District contractor shut it down.

Q. The District shut down the elevator? A. Yes.

* * * * *

Q. When was your next inspection? A. We didn't inspect again until we went up there to start the elevator up, and at that time, why we got in touch with the District. And we checked the cables there periodically because they had been in a fixed position for quite some time.

267 The equipment was all dirty and dusty and so forth, and the District condemned the cables.

Q. The District condemned the cables? A. Yes, they did.

Q. Does disuse have an adverse effect on the cables? A. It could have if the cables are not used constantly. The applicability decreases. They are apt to start cracking.

Q. Did this cable crack? A. We had any number of cracks in that cable.

Q. What did you do as a result of that? A. We pulled the old cables off and put new cables on at that time.

Q. I hand you Plaintiff's Exhibit 24, and ask you if you can identify that document? A. Yes.

Q. Is that your bill that was rendered? A. Yes.

Q. Would you describe the items there and in so doing, would

you indicate those items that were necessary to have repaired as a result of this accident that occurred to Mrs. Fenton's [Pryce] building? A. Well I would judge that the cables in particular and the light circuits seemed to have been effected in some way or another, because we had to run two new wires and, of course, we had to clean all the way through because there was dust from top to bottom.

268 Q. Was that dust from plaster? A. Yes, I would judge it might have been from that.

Q. Did you see a lot of loose plaster around the building? A. I didn't look for it.

Q. How much is the total of that bill? A. \$390.00.

Q. What part of that bill would you say is attributable to the accident that occurred to Mrs. Fenton's premises? A. I would judge that it seems to me that the entire amount would be it because we would never have to have that much service on that elevator in a whole year, ordinarily.

* * * * *

CROSS EXAMINATION

BY MR. FRIEDMAN:

* * * * *

Q. Mr. Berry, would your records indicate when it was last before July of 1959 that your company replaced the cable? A. When we replaced the cable before that.

Q. Yes? A. I don't believe the cables had been replaced prior to that because they were still very flexible and thoroughly satisfactory for District inspection and our own inspection, and probably
269 would have lasted for several years.

Q. They were the original cables which your company had installed when you installed the elevator back in 1944 or 1945? A. Whatever date that was.

Q. You say it could have lasted for a few more years or for several years? A. Oh, yes, it would.

Q. Five, six, or seven years or somewhere in there? A. Somewhere in there.

Q. What would be the cost of a new cable for this elevator?

A. Well that is a little bit hard to say. It is easy enough to figure if you know the exact length of the cables and all but you have got to add your labor in there and very few of your cable jobs will run much less than \$250.00, just for the cable alone.

Q. Just for the cable alone, not included is material and labor? Is that correct? A. Yes.

Q. Now this elevator was located in what part of the building, Mr. Berry, can you tell us? A. The west wall.

Q. Toward the front or rear? A. It was about half way up in the center of the side wall.

270 MR. FRIEDMAN: Will Your Honor indulge me for a moment?

THE COURT: Certainly.

Q. Is the elevator shaft -- does the elevator shaft have its own footings in the building? A. Yes.

* * * * *

EDMUND W. DREYFUSS

having been called as a witness by the plaintiff, and having been duly sworn, took the stand, was examined, and testified as follows:

271

DIRECT EXAMINATION

BY MR. PECHACEK:

Q. State your full name and business address, please? A. My name is Edmund W. Dreyfuss, and my business address is 1019 Fifteenth Street, Northwest, in this city.

Q. And you are a registered architect? A. I am, sir.

Q. And Mr. Dreyfuss, did you enter into a contract with the Abrams for drawing plans with reference to a proposed building at 1919 Eye Street, Northwest? A. I did, sir.

Q. And pursuant to that agreement did you draw such plans and specifications? A. I did, sir.

* * * * *

Q. And following the submission of bids were they submitted
272 to you or to the owner? A. They were submitted to me at my
office and turned over to the owner.

Q. And pursuant thereto was a contract for the construction
awarded? A. It was.

Q. To whom? A. To Lesmark.

Q. When did you learn this contract had been awarded? A. Some
time subsequent to July 17, 1959.

Q. And were your plans and specifications submitted to the Dis-
trict Building for approval? A. They were, sir.

Q. Did you apply for a building permit on behalf of the owner?
A. I did.

Q. And the same was granted? A. It was.

Q. Then thereafter what following the issuance of the building
permit and the entering into a contract for the construction of the new
building, when was your next contact with the project at 1919 Eye
Street? A. On July 28th.

Q. And would you describe the circumstances under which you
were called there? A. I was called to the job by a representative of
273 the District License and Inspection Section, who told me there
had been a problem at the site and would I meet them on the site which
I did.

Q. Approximately what time did you arrive at the site? A.
Approximately 9:00 A.M., sir.

Q. Was Mr. Abrams there? A. No, sir.

Q. Were any of Lesmark's employees there? A. Yes, sir.

Q. Did you observe them on that occasion? A. I did.

Q. What were they doing? A. When I got there they were dor-
mant, physically dormant.

Q. Do you mean by that Mr. Dreyfuss, they were not working?
A. Yes.

Q. Who all were there of the employees that you knew or recog-
nized? A. There was a man who was employed as -- I guess you

would call him supervisor carpenter and two laborers.

Q. Was Mr. Sharp there? A. Yes, sir.

Q. Was he the one you referred to as the supervisor-carpenter?

274 A. Yes, sir.

Q. Were there any District Government people there at the time?

A. Quite a few.

Q. And what did you observe with reference to the construction work that had taken place thus far? A. I recognized that certain excavation work had been performed.

* * * * *

278 THE COURT: If you will just answer the question, which was, what was the condition here when you arrived there?

A. When I arrived at the site on the morning of July 28, I found that this entire area had been excavated, that the soil which was granular material composed of sand and this fill had in fact not only been excavated but had in fact been pushed over because of the characteristic of the material itself. And secondly, many holes had been dug on either side under the two party walls.

Q. Now, were those, shall we refer to those as pits, those excavations under the party walls? A. If you wish.

Q. Were those authorized by the plans? A. No, sir.

* * * * *

280 Q. Mr. Dreyfuss, in excavating for the four columns, two on each wall, do the plans call for excavating under the party walls?

A. No, sir.

Q. What do they call for? A. They call for excavation up to the face of the wall.

Q. Mr. Dreyfuss, upon your experience as an architect and your visual observation made on the morning of this incident occurred, can you state what the cause of the damage was to Mrs. Fenton's and to Mr. Ash's buildings? A. Will you repeat that?

Q. Can you state the cause of the damage to the two buildings at 1917 and 1921 Eye Street? A. It is my opinion that the subject party walls were over excavated.

THE COURT: Over excavated? What do you mean?

THE WITNESS: Excavation had been performed in excess of that called for in the plans and in excess of what I consider prudent action.

* * * * *

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Washington, D. C.
Tuesday, October 30, 1962

* * * *

286

EDMUND W. DREYFUSS

resumed the witness stand and, having been previously duly sworn, was examined and testified further as follows:

CROSS EXAMINATION -- (Continued)

BY MR. FRIEDMAN:

Q. Mr. Dreyfuss, will you please tell the Court what, if any, examination you made or tests were made by you or under your direction to ascertain the soil condition prior to letting the contract and commencement of construction? A. No tests were made.

Q. Will you please tell the Court what tests, if any, were made by you or under your direction to ascertain what footings were actually in place under the wall of 1917 Eye Street? A. No test was made, sir.

* * * *

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Q. Prior to the building being razed, did you make any test borings? A. I did not.

Q. Did you make any soil tests? A. I did not.

* * * *

290

Q. I see. Now, you had active supervision of the construction of this new building and construction at 1919 Eye Street; is that correct? A. I had contracted with the owner to provide the required supervision services.

Q. Prior to the commencement of the excavation, did you request of Lesmark, Inc., or Mr. Abrams that they make test borings? A. I did not.

Q. Did you request of Mr. Abrams that he make a small test excavation to ascertain the existence or non-existence of footings beneath the party wall at 1917 Eye Street? A. I did not, sir. I didn't know that he had started excavation.

* * * *

299 Q. Now, there has been some testimony about the type of soil at 1919 Eye Street, Mr. Dreyfuss. I believe one witness called it a loose sandy soil. Is that correct? Would you agree with that? A. I testified yesterday that it was, sir, a granule material composed of sand and silt.

Q. Well, would you agree with the definition of a previous witness to the effect that it was loose sandy soil? A. I could only agree with my own testimony, sir.

Q. Would you say that this soil had propensity to spill when not supported? A. Laterally supported, sir?

Q. Yes, sir. A. Yes, I would.

Q. Now, did you or someone in your behalf make a test boring after July 27, 1958, on the soil of 1919 Eye Street? A. They did, sir.

Q. Do you have those results with you, sir? A. I believe I do have them in my --

Q. May I see them? A. (Document handed to counsel.)

Q. Did you order this test boring to be made, sir? A. I did, sir.

300 Q. At the request of the owner of the building? A. At the request of the District of Columbia.

Q. As I understand you, this was the first test boring made on this property? A. That is correct, sir.

Q. And this was made by Granger & Oliver? A. Yes, it was.

* * * * *

303 Q. Now, when you came to the scene on July 28th, Mr. Dreyfuss, you saw the kind of soil which was there uncovered adjacent and below and around the bottom of the wall of 1917 Eye Street, did you not? A. I did, sir.

* * * * *

304 Q. When the excavation was made or was being made, so far as these two footings that you show on your diagram on the board, the two interior footings for the columns, would you say it would be normal for the soil to come loose from under the 1917 wall? A. No, sir, not if it was properly excavated and shored.

Q. And shored? A. Yes, sir.

Q. How would that be shored, sir? A. Well, the specifications call for the contractor to provide such shoring as shall be required. There are many ways that it could be shored.

Q. Do the plans show any specifications or requirements for shoring? A. Yes, sir.

Q. Where? A. In the specifications.

Q. I am talking about the plans, Mr. Dreyfuss. A. Shoring is never indicated on the plans, sir.

* * * * *

305 Q. Now, can you tell us how physically this shoring can be accomplished while the process of digging was taking place, or would take place, for these columns? A. In the event such shoring was required, is that your question?

Q. I believe you stated that you would have preferred shoring or would have required shoring. A. Had I been advised of the situation, I would have secured the services of my engineer, who I retained once to design this for me, and had him come in and interpret the shoring for me, as I ultimately had to do.

Q. And this engineer was who, sir? A. Nicholas C. Mandragos.

Q. You employed him in connection with the preparation of the original plans for 1919 Eye Street, so far as the engineering requirements were concerned? A. Yes, I did, sir.

Q. And you consulted him after you were called to the site on July 28th, from an engineer point of view, to see what could be done? A. I did, sir.

* * * * *

306 Q. Now, Mr. Dreyfuss, can you tell me whose responsibility it was to have made test borings to ascertain the condition of the soil prior to the excavation? A. If I thought that I would require a boring, I would have had it made, sir.

Q. Isn't that ordinarily information which is furnished to the owner, sir? A. No, sir, I was the architect.

Q. I realize that you were the architect, but wasn't it your duty and responsibility to advise the owner that test borings could be made and what the results would be, and what the advantages and disadvantages would be, sir? A. Yes, sir. I advised him not to have one taken.

Q. You advised him not to have test borings taken?

THE COURT: The witness so testified, Mr. Friedman.

BY MR. FRIEDMAN:

Q. Was it also not your responsibility to advise the owner about the advisability of making excavations to ascertain whether or not footings were in existence under the 1917 adjoining wall? A. It was my opinion that inasmuch as there was a building that had been constructed

307 on that site and had been there for between 50 and 75 years and nothing had ever happened to it and we were putting a building that had a lighter load than that building, that it wasn't necessary to investigate it.

In other words, we were reducing the load rather than increasing it.

Q. My question, sir, is this: Was it not your responsibility to advise the owner prior to the excavation about the pros and cons about making a test dig to ascertain whether or not footings were in existence at the bottom of 1917 Eye Street, at the adjoining wall? A. It was my opinion that no test was necessary.

Q. Did you so advise the owner, sir? A. If the question came up. I don't recall whether it came up or not, sir.

Q. Now, Mr. Dreyfuss, had you recommended test borings to the owner and test excavations to ascertain the existence or non-existence of footings at the 1917 wall, at whose cost that have been, sir? A. It would have been at the owner's cost, sir.

* * * * *

311

THEODORE C. MAHARA

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAFFERTY:

* * * * *

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Q. What is your occupation? A. Interior Decorator.

Q. And were you connected with the Hamilton Decorating Company? A. Yes, sir.

Q. In what capacity? A. Foreman.

* * * * *

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Q. I show you Plaintiff's Exhibit No. 42 and ask you if you can

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identify that for us? A. Yes, this I will be able to do. When

the job was completed sometime in the spring, we turned in this bill.

Q. What is this Exhibit 42 that I have shown you? A. You mean the bill?

Q. Can you tell us what it represents? A. It represents the entire work, consisting of -- here it starts with the bathroom. We removed the plaster and the tile from two toilets and redecorated. We used the Marlite board.

Q. Now, let me ask you this: What was the necessity of your removing the tile and redecorating the two bathrooms? A. It was loose. Most of it was off, especially the tile, when we got there to work. When we got there to work, quite a bit of it was off. We decided to remove the rest of it and redecorate it. We was thinking about using ceramic tile and plaster the wall four feet. Well, it would have been an expensive job and I suggested to use this material. It would be easier, I think, and nicer looking.

Q. This material you speak of, is that the Marlite board? A. The Marlite board. It shines like tile.

* * * * *

316

Q. What was wrong with the ceilings? A. It was in a terrible shape. It was wavy. The laths work was loose and we couldn't have done

the work without replastering all the ceilings entirely and I again suggested to using something else. I thought the best thing is -- I don't do that work, but someone else -- to put up acoustic ceilings.

Q. Did you, on behalf of Mr. Ash, get bids to put up this type of ceiling? A. Yes. Yes, I did. Four or five and the prices ranged from \$1200 to \$3200. People have done work for me before, subcontracted; and I called them. Finally, Mr. Ash selected someone by the name of Lee from Arlington and he did the job. He also did some plastering.

* * * * *

319 Q. Will you take each item of this bill that you have rendered and tell the Court what, if any, portions of this bill were necessary because of the damage done to Mr. Ash's building that you saw? A. Well, the plastering on the east wall was necessary because it was bad. I could see daylight through it.

Q. Where could you see daylight through the east wall? A. In two places on the first and second floor. If I stayed -- everybody else saw it -- if you stayed at a certain spot on the floor and looked in a certain angle, you could actually see daylight. So we had to replaster maybe a foot or a half or 8 inches on several places in all the rooms facing the east wall up to the fourth floor. * * *

* * * * *

322 Q. Now, will you go forward and tell us what other items were done due to the damage? A. Due to the damage, only the decorating. I have an item here for repairs to the steps, rubber treads on the steps but that is not due to the damage.

Now, then, we redecorated the entire place, that's painting and pointing up. We did some plastering, too, besides the other plasterer. That cost \$830.

323 Q. Do you feel that that was necessary? A. Yes. Yes, it was absolutely necessary.

Q. All right, sir. A. They give an estimate not to exceed \$850. When I got through with the business, it was \$830.

* * * * *

Q. Now, you have told us, did you not, that the acoustical tile was put in by A. W. Lee of Arlington, Virginia? A. Yes, sir; that's right.

Q. Do you have an opinion as to whether it was necessary to be done? A. Yes, it was necessary. There was nothing else we could have done unless we replastered the ceiling.

Q. In your opinion, would the replastering of the ceiling be more or less expensive? A. At least three times as much.

Q. Did you get actual bids? A. For the plastering of the ceiling?

Q. Yes. A. I certainly did. I got two estimates.

* * * * *

324 Q. The work you did on the steps, the rubber treads that you mentioned, how much was that item? A. \$65.

Q. All right. I show you Plaintiff's Exhibit 47 and ask you if you are familiar with that? A. Yes, this was done by these people here, Standard Floor people, in the bathrooms.

Q. What was done by Standard Floors? A. The flooring. Instead of having ceramic floor or -- I have forgotten the word, a kind of a tile floor -- we thought to use that asphalt tile and we got these people to do it for us. That is not three complete; I think it was two complete and one repaired.

Q. Was that necessary as a result of the damage? A. Yes. All cement floors were cracked and the old tile they had, the small round one, was coming out and the plumber did some work there, too.

325 Q. All right. Do you know whether Lee did any plastering work other than the work he did on the ceilings? A. Yes. He did some on the ceilings but he did quite a bit of plastering on the east wall and in two places they would have done it anyhow, but I, myself, suggested to put metal lath. The cracks was wide enough right through, and after they removed the white coat and the brown coat, they put metal laths on the wall first.

Q. Would this be a corner on the walls? A. No.

Q. It was a flat surface? A. They put that metal lath on the brick walls to make sure they wouldn't crack in the future and then they

applied brown mortar and white finish. On all the floors, I saw them do that.

Q. Did you consider the work Lee did in replastering to be necessary as a result of damage to Mr. Ash's building? A. Yes, because the plaster was off the walls already.

* * * * *

333

J. A. WEINBERG, JR.,
called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAFFERTY:

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MR. FRIEDMAN: So far as we are concerned, Your Honor, I might say we are satisfied with the qualifications of the witness as a real estate expert.

THE COURT: Very well.

* * * * *

BY MR. RAFFERTY:

Q. Mr. Weinberg, as a result of a request from the plaintiff, Mrs. Price, did you make an investigation of the property located at 1917 Eye Street, Northwest? A. Yes, sir.

335

Q. As to its value, both prior to 1959 and at the time of its sale in December of 1960? A. I cannot give you an unqualified yes to that. I did make this investigation but I made it at the request of Mrs. Pryce within the last couple of weeks, or so. We sold the property in 1960.

Q. It was your office that handled the sale, isn't that correct? A. Yes, sir.

* * * * *

Q. As a result of your investigation, Mr. Weinberg, do you have an opinion as to the value of the property located at 1917 Eye Street, in 1959? A. Yes, sir.

* * * * *

336 Q. Will you tell us, then, Mr. Weinberg, first how you arrived at this opinion? A. I arrived at this figure from the rough market capitalization and the income at the time of the accident, one tenant, and what it was eventually sold for late in 1960, over one year of attempting to sell it, and arrived at a difference of approximately \$12,500.

Q. Now, the difference of \$12,500 represents what, sir? A. That represents the actual, number one, approximately \$80,000 in my opinion to the property leased to one tenant at the rent of \$9,660 which was quoted to me by the owner of being the rent at the time of the accident in that
337 particular area, with which I am very, very familiar, would have sold then at approximately 100 times the monthly rent, which, by arithmetic is \$80,500, which I rounded off to an even \$80,000 and the fact that in October 1960, we were able to get an offer of \$67,500, which was accepted; and the difference between \$80,000 and \$67,500 is a difference of \$12,500.

* * * * *

CROSS EXAMINATION

BY MR. EDGERTON:

Q. Mr. Weinberg, the value you have stated for the property in 1959, as I understand it, is based solely on a mathematical formula or capitalization of its rental value, what it rented for? A. Not solely, sir. The different properties have different categories, different areas, different public acceptance, public desires to own it, will vary a great deal the capitalization rate or the amount you multiply times annual rent. In this particular case, I used basically the \$805 a month times 100 times the monthly rent, about what the market will pay for that area at that time.

338 Q. Those various factors regarding the general location, demand and what-not, they are determined in the rate at which you multiply? A. Basically, yes, sir.

Q. That is the reason why you multiply by 100 as opposed to 75 or 60 or 50; is that correct? A. Or 150.

Q. Right. So, the capitalization of 100 times rental is based on

these other factors which you have mentioned for this area in this city with which you say you are familiar? A. Yes, sir.

MR. EDGERTON: That is all I have, Your Honor.

[CROSS EXAMINATION]

BY MR. FRIEDMAN:

Q. Mr. Weinberg, were you told what kind of a tenant that was in there in July of 1959? A. Yes, sir.

Q. What were you told? A. Actually, I was familiar with that tenant being in there prior to the accident, Ver Standig Advertising Agency.

Q. You knew they occupied the whole building, did you? A. That is what I was informed.

Q. Do you know, however, that they had a month-to-month lease? A. I understood they had a very short-term lease. I did not know it was month-to-month.

339 Q. You did not know. What influence would that have upon your opinion with regard to the tenancy that was involved here if it was a month-to-month tenancy? A. None, sir, because I was told it was very short.

Q. Did you break down your opinion or estimate with regard to value as to land and improvements? A. No, sir, I did not. It is very seldom that properties this size are actually done in that way by the general market.

Q. And this 100 times monthly rent, would you say that is a rule of thumb that your profession engages in in arriving at a quick estimate of the value of market value? A. Not always. The question of what to multiply by comes from judgment and experience in each particular property, each particular location. As Mr. Edgerton said, it could go as low as 60 or 65 times; it can go as high as 150 or 155 times the monthly rent, depending on all the circumstances.

Q. Your emphasis, then, is placed upon the amount of rent that is collected, is it not? A. Yes, sir. The investment property being basically held by the general market -- the typical buyer is interested

in two things: Amount of income and continuity of income, and by continuity, I also include the safety factor of income.

Q. There was no safety factor for income here, was there?

340 A. Yes; \$805 a month was a fair rental value of that property at that time in the market in my opinion.

Q. There was no continuity or assurance of continuity by reason of the fact this was a month-to-month tenancy, isn't that correct, Mr.

Weinberg? A. Yes, sir, but the value was there.

! * * * * *

Q. Did you know that rather extensive remodeling or repairs or redecorating was done to this building in 1959 and 1960, Mr. Weinberg?

A. Yes, sir.

Q. Would that have any influence on your determination or ascertainment of market value as of that time? A. Which time are you speaking of?

Q. At the time after the redecorations were done. A. Yes, sir.

Q. They improved the premises considerably, didn't they?

A. Not in my opinion, sir.

341 Q. They did not? A. No, sir.

Q. When was the property first listed with your firm for sale?

A. Well had it listed a full year, perhaps a little longer. I do not have the actual dates with me.

Q. Was the property listed with your firm for rental? A. It was -- that, I am very sorry, sir, I have to say I do not know.

Q. Did you know that the property remained vacant from approximately the first of August 1959 until the conclusion of the sale in December 1960? A. Yes, sir. I also saw other real estate firm signs on it for sale or rental during that period. My office is only a couple of blocks away from it. I go by it all the time.

Q. Have you any explanation to offer why that property remained vacant for that period of time, if you know? A. There is a great intangible, sir, in property. Property gets a good name and a bad name.

I can't pinpoint it, Mr. Friedman, but this is not new. A fire, a casualty to any property, people generally begin to get a little suspicious of it and shy off. You can earn, or I can earn a bad reputation, justified or unjustified, and it will take quite awhile to overcome it; and that is not unusual in property.

- 342 Q. Were you familiar with the property at 1919 Eye Street before it was razed, sir? A. Not with the interior, but I have been by it many times.

* * * * *

[CROSS EXAMINATION]

BY MR. CHANNING:

Q. Mr. Weinberg, did I understand you to say that you did not examine and inspect this property before this occurrence wherein the property was damaged? A. That is correct, sir.

Q. And after the occurrence, you did not examine and inspect the property to see what the value of it was immediately after the accident? A. You mean unrestored?

Q. Yes, sir. A. No, sir.

Q. So you cannot testify as to the difference in market value between the building before the occurrence and immediately after the occurrence, can you? A. No, sir.

* * * * *

- 343 Q. What did you base your opinion on that the building, prior to the occurrence, had a value of \$805 per month? A. I have a history here of the building of 1950 to 1959, inclusive, as furnished me in writing by the owner and her attorneys, which I have to accept as being accurate: In 1950 -- these are gross incomes -- \$8,782.00; 1951, \$9,610.00; 1952, \$8,875.00; 1953, \$9,420.00; 1954, \$9,525.00; 1955, \$9,540.00; 1956, \$9,580.00; 1957, \$9,660.00; 1958, \$9,660; and rented for basically at the same \$9,660 per annum until the date of the accident in 1959. So, therefore, it had proved by a ten-year history or a nine-year history the reasonableness of this amount of income regardless of the length of that lease, that some other tenant could be substituted probably at approximately the same rent.

344 Q. So that you based your evaluation of the building before the accident solely on these rentals that you have just told us about?

A. No, sir. I will try to answer that again.

I based it on those rentals and the fact that they were proved, plus general knowledge of that particular area, that zoning, the remodeled houses in there, this having an elevator, which many of them did not, and that this was a reasonable rent with a reasonable safe assurance of continuation at approximately that rent at 100 times the monthly rent.

Q. Now, since the building was damaged, do you know, or did you make an investigation of the rental value of this property? A. I think it is -- from implication of what I said before, the restoration of this property, in my opinion, has just about restored the same rental value.

Q. So that the property was worth, prior to the occurrence, roughly the same rental value as it has today? A. That is correct. But -- I am sorry, sir, I started to go on.

Q. Now, when you sold this building, to whom did you sell it?

345 A. To two engineers. It was sold -- I was not the salesman in our office who actually made the sale. I have a photostat of the contract. It was sold originally to three of them and then two of them, John H. Battison and Martin Blumberg.

* * * * *

Q. Now, you have told us that there is an indefinable something about buildings that have had damage to them, have you not? A. Yes, sir.

Q. They get a reputation, is that correct? A. Yes, sir. They frighten people. People have a little hesitancy of knowing whether it is actually 100 per cent cured or not.

Q. Do you know whether the people who bought this building were told that the building had been involved in this occurrence? A. Oh, yes. That was in my presence with Mr. Hackman when they were in the office.

Q. Do you know whether the building has been sold since this time?

346 A. Yes, sir.

Q. Do you know to whom it was sold? A. Yes, sir.

Q. Do you know what the price of the sale was? A. Yes, sir.

We participated in the resale.

Q. Could you tell us what that was? A. Ray Anselmo.

Q. What was the amount, sir? A. \$75,000.

Q. Would that be an indication of the market value of the building at the time it was sold? A. Well, the proof of any pudding is in the eating, sir.

Q. So your answer to that would be yes, would it not? A. Yes, except that it also shows -- what I am speaking of, the intangibles -- at the time the original contract was entered into, there were no leases that Mrs. Pryce had. The contract reads it is vacant, subject to no tenant. In the interim, they had obtained -- they had been able to obtain partial tenancies for part of the building. The fact that someone had finally bought the building -- we were not the only brokers that had it, by far; we had it for sale for over a year -- and the fact that some of that fear
347 and the fact that some of the tenancies involved are already obtained strengthens my opinion of the \$80,000, sir.

Q. Mr. Weinberg, when this building was listed with you, what listing price was put on it? A. This is from recollection, sir -- I could stand corrected -- I believe about \$90,000.

Q. Isn't it a fact that this building, at about the time it was listed with you, it was listed with several, or a number of real estate agencies in the District of Columbia? A. I know it was listed with others, but I have no list of with whom it was listed.

Q. Isn't it a fact that the building was listed at \$80,000? A. It was later reduced to that. Initially, I think the ninety is correct, sir. As I said, I am not positive about that. It was above \$80,000. I think it was \$90,000 and then reduced to \$80,000.

Q. Mr. Weinberg, isn't it usual in the District of Columbia to list properties, even reduced listings, for more than you actually expect to get from the market? A. Not necessarily. Sometimes yes, and sometimes no.

Q. It does happen quite often, does it not? A. Oh, yes, sir.

MR. CHANNING: I have nothing further, Your Honor.

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348

ROBERT ALLEN HARRIS

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAFFERTY:

* * * * *

Q. What is your occupation? A. Electrical contractor.

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349

Q. Did you bring any records with you this morning in connection with work done for Mrs. Pryce at 1917 Eye Street, Northwest? A. Yes, I brought a duplicate of the bill that I had rendered to Mrs. Pryce, Mrs. Fenton at the time.

* * * * *

Q. Let me show you just the bills that have been marked as Plaintiffs' Exhibit 26 and ask you if you didn't submit those to Mrs. Pryce, then Mrs. Fenton? A. Yes, sir.

350

Q. Will you tell us what those bills were rendered for? A. For work that Mrs. Fenton authorized me to do and are itemized in the bill itself.

* * * * *

Q. Will you describe briefly for us the nature of the work that you did for Mrs. Pryce at the premises? A. Removed the air conditioners for her; removed the lighting fixtures. All but one air conditioner was removed the first time. That couldn't be taken out due to the fact that they had some supporting members that had been placed in front of it. I personally did not do the work; my men did the work.

Q. Did there come a time later when that other air conditioner was removed? A. Yes, sir.

351

Q. Did you do any additional work at a later time? A. Like what, sir?

Q. Did there come a time when you restored or replaced the air conditioners? A. Yes, I restored -- replaced, yes. We rehung the fixtures. We put the air conditioners back into the windows as they were originally, at the request of Mrs. Pryce.

Q. I ask you, do you consider the bill you rendered for these services to be fair and reasonable? A. That I do, sir.

* * * * *

352 Q. Do you have any recollection of having checked the wiring in the building? A. Yes, the boys went through it to see if there was any damage done to the wiring. They checked through the entire building.

* * * * *

353 Q. Did you replace 14 fluorescent starters? A. Yes.

Q. Did you replace one two-lamp 40 watt fluorescent ballast?

A. As noted there, yes, sir.

Q. And three porcelain pull-chain fixtures? A. Yes, sir.

Q. And one lamp 12 inches opal glass fixture for the office room?

A. Yes, sir.

Q. And 17 40-watt rapid start fluorescent lamps? A. Yes, sir.

* * * * *

354

CROSS EXAMINATION

BY MR. FRIEDMAN:

Q. Mr. Harris, you were told to remove the light fixtures and to store them in the back of the building; is that correct? A. That is correct, sir.

Q. These light fixtures were not damaged in any way, were they? A. No, not at the time. When you say "damaged" -- if there was a lamp broken in its removal or something like that, that I can't say, sir.

Q. The air conditioners were also removed from the windows and stored, and later put back in the windows by your men, isn't that correct? A. Yes, sir.

Q. There was no damage to those air conditioners, was there? A. To my knowledge, no.

Q. Do you know whether or not these fluorescent fixtures had starters when you had them removed from the places where they were originally? A. Personally, I believe they did. I can't swear that they did have or didn't have. I didn't take them down personally. My men removed them.

* * * * *

358

WALTER S. CHARRON

called to the witness stand on behalf of the Defendants Charron, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

BY MR. EDGERTON:

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360

Q. What did you do with respect to proceeding with the razing of the old building and building a new one? A. All of this was turned over to Mr. Dreyfuss, that's the architect, and it was left in his hands.

* * * * *

365

JOHN S. HENDERSON

called as a witness on behalf of Defendant Lesmark and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

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369

Q. Mr. Henderson, when you examined 1917 Eye Street, what part of the building did you enter and examine? A. First floor and second floor and third floor. We entered into the front door. That is where most of the damage was; on the front and the side.

Q. Did you, at Mr. Abrams' request, repair the plaster? A. Yes, sir.

Q. On which floor, all floors? A. All the floors.

Q. On the front of the building, was that? A. Yes, sir, that was repaired, too.

* * * * *

370 Q. How much were you paid? A. The full price of that.

THE COURT: I cannot hear the witness.

THE WITNESS: The full price of it, \$750.

* * * * *

373 HERBERT MANUCCIA

called as a witness on behalf of the Defendant Lesmark and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

* * * * *

374 Q. What is your profession? A. I am a consulting engineer and also Assistant Professor at Catholic University of America.

* * * * *

381 Q. What was your opinion as to the cause of the condition existing at 1917 Eye Street at that time? A. That there was movement of the building, a vertical movement due to, let's say, undermining of the bottom of the wall, due to a subsoil movement.

* * * * *

383 Q. Now, this footing of the wall of 1917 Eye Street, would you scale it and give me the approximate dimensions, sir? A. May I explain something on this detail?

Q. Yes. A. He does not specifically state that this is the building on one side or the building on the other side. He just calls it a typical section.

Q. If you were to assume that the adjoining wall of the existing wall is at 1917 Eye Street, -- A. Assume that it is of 1917 Eye Street, yes. Proceed, please.

Q. What would be the size or the dimensions of the footing for that wall as shown by that drawing? A. Well, I haven't got a scale with me. It approximately --

Q. Well, let me give you a ruler. (Ruler handed to the witness.)
A. This footing is shown as being 20 inches wide by 12 inches deep.

Q. And what is the size of the wall which appears to rest on that footing, the existing wall? A. The wall scales 8 inches.

384 Q. Now, from your experience, Mr. Manuccia, will you tell me whether or not a contractor employed to construct that building, as shown by those plans, would rely on the showing there of the footing in the adjoining wall of 1917 Eye Street? A. A contractor seeing this would say there is a footing there at 1917 Eye Street, under the wall that exists.

Q. Does that plan show a pier going below the footing? A. A pier below the existing footing?

Q. Yes. A. There is no pier below the existing footing.

Q. Alongside the footing. A. Alongside the footing -- (Perusing plans.)

Q. You may refer to the rest of that page, if you wish, sir.

A. This being a typical section, he shows a steel column with the base plate 9 inches above the top of the existing footing. According to this sketch, there should be a wall there, reinforced concrete foundation wall.

Q. What would that rest upon? A. This column here, then, would rest on the intersection of this wall coming in one direction and the other wall, which I believe would be shown up in the front here -- (perusing plans.) He has got a wall along the interior. * * *

* * * * *

390 Q. What effect does the shoring have on the buildings adjoining it?

A. This type of bracing that is here prevents the wall of the buildings from collapsing.

Q. In which direction? A. Laterally.

Q. Laterally. Will that prevent any vertical settling? A. No, it would not.

Q. What did you find, in your opinion, was necessary to correct the vertical settling? A. The footings of the existing walls would have to be underpinned to prevent any settlement or further cracking.

Q. Were you advised whether there was any footing in the existing

walls at 1917 Eye Street? A. At the time I was informed that there was no footings under that wall, existing footings, and that there was just one layer of brick under the existing wall.

Q. When you say one layer of brick, what do you mean? A. Instead of a footing, probably extending out a fraction of an inch on each side.

Q. Were you advised that the footings shown on Plaintiffs' Exhibit 52, the plans, the footings shown there for 1917 Eye Street was or was not there? A. I was advised that that footing was not there at
391 the time of my inspection.

* * * * *

392 Q. Now, Mr. Manuccia, in your opinion, based upon your experience, what were the steps that should have been taken or what should have been done, and by whom, before the excavation was started, in order to have prevented this occurrence? A. It is customary and standard practice to have test borings made of the soil.

393 Q. What do they consist of, sir? A. They consist of drilling into the soil and this type of equipment brings up the soil strata at various elevations and it is recorded by the contractor that makes these test borings.

Q. It is what? A. Recorded and put in a log form, what we call log form, with the type of soil and the elevation of that soil.

Q. In your experience what has been the custom and practice as to whose responsibility it would have been to make those test borings? A. Ordinarily, the engineer asks the architect to have test borings made and the architect informs the owner that test borings need to be made. It is a matter of economics who is going to pay for it.

Q. Who, generally in practice, pays for these test borings? A. The owner generally pays for them.

Q. Were you advised whether or not any test borings were made on this job prior to the excavation? A. I don't know if anybody told me directly, but I assume no test borings were made.

Q. Now, what did good practice dictate, if anything, prior to excavation to ascertaining whether or not there were footings in the adjoining walls of 1917 Eye Street? A. Well, some sort of investigation should be made -- any time you construct a building adjacent to another building, some sort of investigation should be made to ascertain definitely whether or not footings are there and the extent of those footings, the width and depth and the elevation of the footings.

Q. And the investigation is to be made by whom, sir? A. It generally is the responsibility of the architect.

Q. Would excavations have determined whether or not there were footings in existence? Had test excavations or borings been made, would that have ascertained whether or not there were any footings?

A. Not test borings; test borings would only indicate the type of soil you have at certain levels. Excavation at various points along there adjacent to the building would determine whether you had footings. There is a difference between test borings and excavations to find out whether you have any footings.

Q. Yes, sir. Now, did you make an inspection -- let me first finish up with 1917 Eye Street.

Have you testified fully as to what you found there in the inside of that building as well as the outside? A. Of this building 1917 Eye Street?

* * * * *

Q. And this is the condition you found at 1921 Eye Street?

A. That is one of the conditions I found. I also found paint in some of the cracks, indicating --

Q. You mean of the plaster cracks? A. In the plaster cracks in the upper floors, indicating that those cracks existed prior to the painting and it didn't appear to be recent painting. That is what led me to say they appeared to be old cracks.

Q. Is this generally what you found in the nature of cracks at 1921 Eye Street? A. Yes.

Q. What else did you find there, if anything? A. Just wall cracks.

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CROSS EXAMINATION

BY MR. CHANNING:

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Q. You told us about designing some skyscrapers, I believe.

A. In New York City.

Q. And, of course, you would use soil boring tests there, wouldn't you? A. Definitely.

Q. Have you ever designed any smaller buildings such as this in the District of Columbia, where there were party walls on either side?

A. Yes, many.

Q. Many? A. One story and two story buildings.

Q. In the downtown area? A. Well, no, not the downtown area; in the outlying districts, such as Northeast, Southeast.

Q. These were small buildings? A. Small stores.

Q. Where party walls existed on both sides? A. Yes.

* * * * *

407

Q. Could you give us the locations -- I know it's hard to remember, but could you give us the locations of any of these buildings that you designed, this smaller type? A. I couldn't offhand. I could send you a list of them but I couldn't offhand. It is quite a few buildings.

Q. Would the plans and specifications, if you could send me a list, be available somewhere? A. Down at the District Building. If you want a list at a future date, I would be glad to go through my files and pick them out.

Q. Would these buildings, all these, show that you had soil borings? A. No.

408

Q. It is not done all the time, is it, in small buildings? A. No, not all the time.

Q. Usually the architect or the engineer who does this makes up his own mind as to whether he thinks it is necessary, is that correct?

A. Not the engineer. Every building I designed, I always asked the architect to have test borings made or tell me what the bearing value of the soil is and he will tell me and, therefore, relieve me of the responsibility.

Q. So that if the architect knows the soil bearing quality or is familiar with the exact neighborhood, then with a small building such as this it wouldn't be necessary for you to require it? A. That is correct, if he knows.

Q. And on plans where no soil boring tests have been made, the structural notes indicate that the soil bearing qualities are assumed, don't they? A. That is correct.

Q. I wonder if you would look on the plans there on page 3 and tell me if there is not an assumed value for soil bearing qualities?

A. Soil value assumed at 6,000 pounds per square foot.

Q. So that, when the builder, who is building the building according to those plans, he reads those notes, doesn't he? A. That is correct.

409 Q. And he knows from those notes that there has been no soil boring test made? A. When it is assumed, then one assumes no test borings have been made.

Q. Now, sir, I believe you mentioned when you first testified about the footings under the existing wall, you said you see there were footings in a light line. Do you remember saying that? A. I do.

Q. Did that indicate to you that those were assumed footings? A. No, it indicates that those footings existed.

Q. I see. It did not indicate assumed to you? A. No, it does not indicate that they are assumed to be there.

Q. Now, when excavations are made to explore for existing footings, the builder knows about this, does he not? A. Would you please repeat that question?

Q. I said, when excavations are made -- I believe the type I am talking about are excavations to determine whether there are existing

footings in the party wall -- when such excavations are made, the builder
 410 customarily knows this, does he not? A. That is correct.

* * * * *

411 Q. I show you Plaintiffs' Exhibits 5, 6, 7, 8, and also 4, and in these
 photographs there are excavations made under the party wall, are there
 not? A. Yes.

Q. Now, when the very first hole or excavation was dug under that
 party wall, it revealed that the party wall had no concrete footings, didn't
 it? A. That is correct.

Q. So that there would be no further need to dig under the party
 wall to discover whether there were footings, would there? A. If he
 looked at one location and didn't see any footings, it is his discretion to
 say footings do not exist along the entire wall or take more test holes to
 determine if that is so, or if it is only at one location.

* * * * *

415 Washington, D. C.
 Wednesday, October 31, 1962.

* * * * *

417 HENRY JAMES KLIX

called as a witness on behalf of the Defendant Lesmark and, having been
 first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

* * * * *

Q. What is your occupation? A. I am a painting contractor.

* * * * *

419 Q. My question, first, Mr. Klix, was can you tell us what the con-
 dition of the rear portions of the building were that you did not paint?

A. Well, they were in normal condition, more or less, with exception of
 age.

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421

CROSS EXAMINATION

BY MR. RAFFERTY:

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422

Q. And that the condition that you saw was more or less normal except for age; is that your testimony, sir? A. Yes, it needed painting and, of course, I didn't know whether, in the leases that Mrs. Fenton had with her tenants, the tenants would have to more or less keep up their premises, but evidently they did not.

Q. Mr. Klix, did it need anything other than painting? A. Well, of course, there were cracks in it. There are always cracks in a building, but, I mean, there were no deep cracks.

Q. You are sure of that? A. Yes, I am quite sure of that.

* * * * *

427

DONALD HUDSON DRAYER

called as a witness on behalf of the Defendant Lesmark, Inc., and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

* * * * *

Q. What is your profession, Mr. Drayer? A. Architect.

* * * * *

429

Q. Let me ask you first, Mr. Drayer, what is the purpose of test borings in soil? A. To determine the load-bearing qualities and the texture of the soil.

Q. Can you tell us what the standard of good practice requires of an architect in his relationship both to the owner and to the builder with respect to the necessity for or advising that test borings be made before construction begins?

430

* * * * *

432

Q. My question, Mr. Drayer, is what does the standard of good practice require in the District in that respect of an architect? A. I consider it good practice to determine the joint conditions when you are building between party walls.

Q. My question, Mr. Drayer, is, is that the standard of good practice in the practice of architecture in the District of Columbia to require what you have just described? A. Yes. I think architects are likely to take calculated risks on borings, but I consider it good practice.

* * * * *

Q. Mr. Drayer, I hand you Plaintiff's Exhibit No. 52, a set of plans, and ask you to please examine it and tell me whether or not those plans show an existing footing in the adjoining wall or walls to the property under construction?

* * * * *

433 THE WITNESS: There is a footing indicated on sheet No. 2: It is called "Typical Section," in the upper righthand corner of the page.

BY MR. FRIEDMAN:

Q. Can you tell us the approximate dimension of that footing that you have just described, sir? A. It appears to be about 24 inches wide and 12 inches deep.

* * * * *

Q. Now, if you were to have prepared those plans and with that typical section in there, what have you to say with respect to the builder's reliance upon that showing of a footing? A. I think he would expect to find one there.

* * * * *

437 Q. Now, Mr. Drayer, can you tell us whether or not the contractor or builder must expose that existing adjoining wall at the bottom or footing? A. To comply with this drawing, yes.

438 CROSS EXAMINATION

BY MR. CHANNING:

Q. I would like to show you Plaintiffs' Exhibit 8 and ask you if that shows excavation under the party wall and beyond the property line? A. It does.

* * * * *

439 Q. Let me show you Plaintiffs' Exhibits Nos. 4, 6, 7; and now we come to 5, which is out of order; and I ask you if those photographs do not show excavations under the party wall and beyond the party wall line?

A. They show excavation under -- The distance back from the face of the party wall, I can't tell, I would have to guess. They do show excavation under the party wall.

Q. And would you examine the plans, the structural plans and tell me whether the structural plans show that any excavation is to be performed under the party wall?

440 A. The drawings seem to indicate the work stops at the face of the party wall. I am not sure that it would be humanly possible to construct the building to that exact part of the drawing.

Q. You can explain that, but the drawings show that the work stops at the face of the party wall; isn't that correct? A. It shows a line there. This typical section referred to shown in the upper righthand corner of Sheet 2, it shows a line but does not indicate work beyond that line.

Q. There is no work to be performed under those plans that goes beyond the party wall, isn't that correct? A. Let's put it this way: There is an absence of an indication of what to do beyond that line.

Q. Mr. Drayer, I would like to ask you again, do the column footings in any place extend under the party wall? A. The drawings do not -- this particular drawing that we are looking at now does not show it.

Q. Can you find any other drawing there that does show one that goes under the party wall? A. (Perusing plans.) Not obvious.

Q. Well, would your answer, then, be no? A. Yes, sir.

* * * * *

443 Q. Let me ask you this: Assuming the situation that existed as we have described it before with the bank going along the entire wall and no holes being dug on the day before the movement, would you consider that it was good building practice on the part of a builder to go forward and dig these holes under the party wall? A. The process

of underpinning requires that you do dig holes under the party wall.

444 Q. But these plans don't show any underpinning, do they?

A. They do not. There seems to be an absence of indication of what to do.

Q. Wouldn't the proper good building practice at this point be to call the architect and advise him of the circumstances and ask him to come over and take a look at the excavation? A. There is evidence that it would have been good practice.

Q. Have you examined the specifications for this job? A. I have not seen them.

Q. Do you know whether it is good practice in specifications to require that the architect be called by the contractor when such a situation exists? A. I am trying to recall in my own mind -- I am not sure whether I have such a clause in my specifications or not. I think it would probably be good practice but I am not sure that I have it in my own specifications.

Q. And if such a clause were in the specifications in this job, that would be good architectural practice under the circumstances, would it not? A. In hindsight, yes.

* * * * *

448 Q. Now, sir, do you contend that these plans, which you have before you, which show a footing under the party wall, do you contend that they should have been interpreted by the builder as showing that in fact such a footing existed? A. I think he had every right to expect footings, yes.

* * * * *

449 Q. If the builder knew that no test excavation had been made to determine whether a footing existed, then wouldn't he have to know that this was an assumed footing on the plans? A. The answer is yes to that; right.

Q. And this assumed footing was shown to be a continuous footing, is that correct? A. Yes.

Q. And the very second that this builder went under the party wall

for the first time and saw no footing, he then knew there was no continuous footing, didn't he? A. Yes.

* * * * *

455

RECROSS EXAMINATION

BY MR. CHANNING:

Q. Mr. Drayer, a builder before starting any underpinning where none is shown on the plans and specifications, wouldn't he, in complying with good practice, call the architect first before he started any such operation? A. It would have been a good idea. I think the answer is yes.

Q. And the architect would then design the underpinning, wouldn't he, or the structural engineer? A. Usually, if there is a structural engineer, and there was one on this job, it would be his job.

Q. And the District of Columbia would have to approve this type of underpinning, wouldn't it? A. That is usual.

* * * * *

460

MICHAEL MELVIN ABRAMS

called as a witness on behalf of Defendant Lesmark, Inc., and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

* * * * *

461

Q. The corporation is what? A. Lesmark, Incorporated. I am president of the corporation.

* * * * *

Q. And Lesmark, Incorporated is a party to this case and was the builder under the contract with the owner, Mr. Charron? A. That is correct.

* * * * *

463

Q. Now, if you will take those plans, Plaintiffs' Exhibit No. 52, please, and tell us what, if anything, is shown in those plans with respect to the adjoining walls. A. On sheet 3, it shows that the adjoining walls have footings.

Q. Both sides? A. Both sides.

Q. And the approximate dimensions under the scale of those drawings are what? A. It shows that both footings are 20 inches wide by 12 inches in depth.

Q. That is both footings on the 1917 Eye Street wall and the 1921 Eye Street wall? A. That is correct.

Q. And will you state whether or not they show these footings to run along the entire length of each adjoining wall? A. That is correct. It shows that as a continuous footing.

Q. In your practice as a builder and in the construction business, and based upon your background experience, sir, what would you say as to whether a builder had a right to rely on those plans with respect to the existence of the footings in the party wall adjoining? A. I

464 would say that I would rely on footings being there because it is shown on the plans.

Q. Did you rely upon them in this case, before you started construction? A. Yes, I did.

* * * * *

474 Q. Did you ascertain on that day, when you went to make an inspection, that there were or were not footings under the 1917 Eye Street wall? A. Yes, we ascertained that.

Q. What did you ascertain? A. We dug small holes along the wall to see if there were footings there and you could see there were not. The brick extended approximately one inch beyond the face of the wall, that is, the flat brick course that was laid first.

* * * * *

478 Q. Will you tell us how and in what manner they differ from the original plans in Plaintiffs' Exhibit No. 52? A. The plan, first of all, in the rear shows underpinning of two walls.

Q. Which walls? A. The wall of 1921 Eye Street from the rear past the stairway, a distance of a total of 20 feet, plus or minus, from the rear wall; and it also shows the same distance at 1917 Eye Street for a distance of 20 feet from the rear wall.

It also shows the elimination of the column piers which were shown originally and shows the pouring of mass concrete along both sides of the original excavation to stabilize the soil.

* * * * *

483 Q. What else did you find at 1921? A. I found after -- there was some sort of a paneling in front of the walls and I had to use a flashlight to open up some openings in the paneling to look.

Q. When you say "the wall," to which wall are you referring?
A. This would be the east wall of 1921 Eye Street, which would be the wall up against 1919 Eye Street.

Q. Are you talking now about the interior or the exterior? A. The interior. There were no visual cracks on the exterior. On the interior, I looked with a flashlight because that was the only way downstairs that I could see and I could see very faint hairline cracks that had been painted over. I didn't see any new cracks. If I had seen a new crack, I would have seen the white of the plaster surface.

484 Q. Is this the basement you are talking about? A. Both in the basement and the first floor. Upstairs, I noticed nothing unusual.

Q. What do you mean by "nothing unusual"? A. I noticed nothing that I can remember that was a new crack.

Q. Did you examine the ceilings of 1921 Eye Street? A. I examined the ceilings. I noticed the roof in the top floor in the rear that were water stains but they looked as if they had been there for some time. .

Q. Are you able to tell us whether the ceiling showed any evidence of any cracks? A. To my recollection, I didn't see any cracks in the ceiling.

Q. Were you able to tell whether or not any plaster had fallen from these ceilings? A. I had seen no evidence of plaster on the floors of any fallen plaster.

Q. What else did you find there, anything? A. I didn't find any damage, in other words, except this rear wall crack and the people were working in the building. There was no excitement about anybody leaving.

Everybody stayed in the building. The street was roped off primarily for the Fenton building, but the work went on as usual.

485

Q. What did you notice, if anything, with regard to the exterior east wall of 1921 Eye Street, adjoining 1919? A. I noticed that where the building had been taken down of 1919 Eye Street, that there were large boulders of stone that were noted to me. It seems that in the days when they built this building, if they didn't have any brick, they used a boulder to fill up the hole.

Q. I show you Plaintiffs' Exhibit No. 4 and ask you if that depicts the exterior east wall of 1921 Eye Street, in part? A. That depicts the east wall and it shows a series of three large boulders in the wall.

Q. Do they appear to have been in there originally when the wall was built? A. They appear to have been in there originally when the wall was built.

Q. What have you to say with respect to the mortar of that wall? A. The picture shows that the mortar has leached out of many joints.

Q. What do you mean by "leached out of many joints"? A. I mean that the mortar has pulverized and has just come out of the joints so that you see a void between the bricks and it looks as if it would be a minimum of a quarter to a half an inch. Some of them, it's even half
486 the brick.

* * * * *

Q. Now, what did you, with respect to anything in 1921 Eye Street interiorally? Did you do anything? A. I didn't notice anything.

Q. What did you do with respect to 1917 Eye Street in addition to exterior work which you have told us about? A. I repaired all of the damage that was agreed between Lesmark, the District of Columbia, and Mrs. Fenton.

Q. Now, I show you Defendant Lesmark's Exhibit No. 11, a bill from Mr. John S. Henderson. Is that the bill for his plastering?

A. That is correct.

Q. Did you pay the amount there shown? A. I paid him \$750.

Q. What work did that cover? A. That covered replastering

the ceilings and the walls where we had the damage that was agreed upon between ourselves and the District of Columbia and Mrs. Fenton to repair so that the building would be put back in the condition that it was originally.

* * * * *

487 Q. I show you Defendant Lesmark's Exhibit No. 14 and ask you if that is a bill for the painting? A. That is a bill for the painting.

Q. Where? A. This is a bill for painting at 1917 Eye Street as per agreement. May I explain?

Q. What is the amount of that bill? A. \$400.

Q. Did you pay it? A. I paid \$400 by our check.

Q. That was for the painting of the interior rooms of Mrs. Pryce's building? A. On all the rooms that were damaged where we had to repair the plastering, all these rooms were repainted.

* * * * *

488 Q. Did Mrs. Pryce, then Mrs. Fenton, request you to plaster or paint the hallways or stairways in the back rooms of her building?

489 A. She never requested us to do any of that work.

* * * * *

494 [THE WITNESS:] A total of \$2,807.86. This was just pertaining to 1917 Eye Street.

* * * * *

502 CROSS EXAMINATION

BY MR. CHANNING:

* * * * *

503 Q. Now, before commencing your excavation work, you knew that no soil boring tests had been made, didn't you? A. I didn't know that.

Q. Well, did you examine the plans and specifications before you started to work? A. I examined the plans and specifications. There was no indication on the plans and specifications -- from examining them, I didn't see anything indicating soil tests.

Q. In other words, there was nothing on the plans and specifications that a soil boring test had been made? A. That is correct.

504 Q. As a matter of fact, Mr. Abrams, in the structural notes where it states the soil bearing qualities, it states that this is assumed, doesn't it? A. That is correct.

Q. And this is what is always stated, is it not, in structural notes where no soil boring tests have been made? Isn't that right? A. Where there are no soil boring tests, you are correct, it would be assumed.

Q. So that then you knew that no soil boring tests had been made, didn't you? A. I still didn't know.

Q. Did you ask anyone if a soil boring test had been made? A. I did not ask anyone.

* * * * *

Q. Now, prior to beginning your excavation, when you visited the site, did you see any evidence there that any test excavations had been made to determine whether or not the party walls did, in fact, have footings under them? A. I saw no evidence.

505 Q. Did you at that time know whether or not any test excavations had been made? A. I did not.

THE COURT: What is it?

THE WITNESS: I did not know.

BY MR. CHANNING:

Q. Did you ask anyone if test excavations had been made? A. I did not ask anyone. Excuse me -- May I make an explanation?

THE COURT: It is not necessary. Just answer the questions.

BY MR. CHANNING:

* * * * *

514 Q. Was any attempt made to dig under these walls to locate the footings? A. Not previously to the date of the accident.

Q. Now, Mr. Abrams, the first time that an excavation went under the wall and met no masonry at all and got under the wall, you then knew there was no continuous footing, didn't you? A. We never dug -- we dug straight downward. We dug a hole downward and the earth fell from under the footings.

Q. I see. You were there when it was dug; is that right? A. I saw it afterwards and I spoke to my men.

Q. The first time the earth fell down, you could see under the wall, couldn't you? A. We dug straight down and the earth fell away, the sand --

THE COURT: I do not believe the witness is answering your question. Restate your question to the witness.

BY MR. CHANNING:

515 Q. The first time you dug straight down, you meant that you dug right along the party wall line, didn't you? A. That is right.

Q. And the minute that you got down below the bottom of the wall, the earth fell away; is that right? A. As we dug straight down, the earth fell away.

Q. And when the earth fell away, you could see that there were no footings, couldn't you? A. That is right, we could see.

* * * * *

518 [CROSS EXAMINATION]

BY MR. RAFFERTY:

* * * * *

527 Q. On the 28th of July, at the orders of the District and in order to secure these two party walls, you put up voluminous shoring, did you not? A. That is correct.

528 Q. How long a period of time did that take? A. It took us approximately two days, I would say, to complete it.

Q. So, would it be the remainder of the 28th and the 29th?
A. The remainder of the 28th and the 29th and possibly some of the diagonals would go to the 30th, but the basic part of it was put up on the 28th.

* * * * *

Q. Were these boards alongside, that is, the boards running the height of the buildings on either side, how were they secured to the building? A. They were just put up against the walls and struts between them. They were nailed, if that is what you mean.

Q. Were the struts forced between them so that they would be secured tightly? A. That is correct; they were forced between them with wedges to make sure that they were tight.

Q. Would you use any instruments to wedge them so they would be securely wedged? A. We used tools, not instruments.

529 Q. Well, I am not trying to be picky about it. What type of tools would you use? A. We would have to use a hammer to hammer the wedge in to make sure that the struts were tight.

Q. Wouldn't the use of a hammer in these circumstances cause additional vibration against the plaster on the inside of these walls?

A. Well, we were under orders to do this --

THE COURT: No. Answer the question.

THE WITNESS: I would say it could, yes.

BY MR. RAFFERTY:

* * * * *

533 Q. You testified that your engineer, Mr. Manuccia and Mr. Locrift, following this accident, discussed what was required to repair the building; isn't that true? A. That is correct.

Q. Now, their agreement as to repairs related only as to structural repairs, isn't that true, and the plans thereafter were drawn to cover that; isn't that so? A. That is correct.

* * * * *

538 Washington, D. C.
Thursday, November 1, 1962

* * * * *

542 REDIRECT EXAMINATION

BY MR. FRIEDMAN:

* * * * *

543 Q. With respect to the elevator at premises 1917 Eye Street, where was its location? A. The elevator was located -- I am going to refer to the block plan which shows both buildings. It was located approximately, I would say, about 40 feet from the front of the building. In other words, it was located beyond the wall in question. The wall in

question where we had our bracing was going 30 feet back.

Q. Where was its location with respect to the east or west walls of 1917 Eye Street? A. My recollection is it had its own footings,

544 its own bearing walls. I would say it was approximately about six feet west -- I am sorry, six feet east of the west wall in the rear of it; beyond the rear of it, about eight feet beyond the rear of it.

Q. Now, will you state whether or not the elevator had its own enclosure? Was it a solid enclosure? A. I believe it had its own cinder block walls. It was built as a separate unit, had its own walls. It was an electrical elevator with its own little penthouse where the walls are used as bearings for the cables, for the motors and everything.

Q. In making the repairs to 1917 Eye Street, did you or any of your men have any occasion to go near or be around the elevator at 1917 Eye Street? A. No, sir.

* * * * *

549

HERBERT MANUCCIA

called as a witness on behalf of the Defendant Lesmark, having been previously duly sworn, resumed the witness stand, was examined and testified further as follows:

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CROSS EXAMINATION (Continued)

BY MR. CHANNING:

Q. Mr. Manuccia, when you examined drawing No. 3 on the plans of Mr. Dreyfuss, you found that that showed an assumed footing, did you not? A. I did.

Q. And that was the way you read those plans? A. Yes, sir.

* * * * *

551

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q. Mr. Manuccia, I show you again Plaintiffs' Exhibit No. 52, the plans with respect to the building in question, and ask you to tell us, please, according to the plans at how many places are there indications

that there are existing footings under the wall of 1917 Eye Street, Northwest? A. There is an indication on drawing No. 2 showing that a footing exists under the existing wall.

On drawing No. 3, there is a front elevation shown and on both sides of this front elevation, it distinctly calls for existing footings -- it is written out in abbreviated words -- under the existing walls.

552 Q. You mean 1917 Eye Street? A. That would be on 1917 Eye and also on 1921 Eye; it is on both sides of the elevation.

The same appears on the same drawing, a rear elevation and the architect designates existing footings underneath the existing walls and spells it out with abbreviated wording; that's on both sides of the contemplated building, on the new building.

On the same drawing No. 3, taking a cross-section through the building, footings are indicated underneath the existing walls on both sides of the new building.

* * * * *

554 Q. Where are the new footings to be placed, sir? A. Drawing No. 3 indicates that the footings are to be placed underneath the existing wall footings.

Q. Of 1917 Eye Street? A. Of 1917 and 1921 Eye Street.

* * * * *

567 Whereupon,

EDMUND W. DREYFUSS

called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. CHANNING:

* * * * *

569 Q. Now, your plans that you have drawn actually show footings here, do they not? A. It shows the footing that is assumed to be at that level, but that is the worst elevation that it could possibly be at because the floor as shown in the line where the "B" is indicated, it is at

that point that the footing would have to be below the floor on both sides because I went in both places and saw them.

Q. Can you tell me why you assumed this wall had a footing (indicating)? A. It is the natural practice in architectural design that any building would have a footing, and this building did have a footing.

Q. What kind of a footing was it actually discovered this wall had? A. A brick masonry footing.

Q. Now, regarding the plans where you show this footing, how are these plans to be interpreted by a contractor? A. The contractor should assume that there is a footing at that elevation or below. And

570 immediately upon beginning his construction, he should investigate to see that they are there. If they are below there, then there is no problem whatsoever; but that would be the worst elevation at which they could be located.

* * * * *

571 Q. Now, Mr. Dreyfuss, you visited the scene on the morning of the 28th; is that correct? A. Yes, sir.

Q. Was that the first time you had been to the construction site? A. The first time after the building was started, sir.

Q. When did you first learn that the building had started? A. On that morning, sir.

Q. Do you recall the date when all of the contract proposals were in? A. The bids?

Q. Yes. A. June the 1st.

Q. And after you received those proposals, what did you do with them? A. I submitted them to the owner and his representative.

Q. Who was his representative? A. Mr. Philip Rosenfeld, his attorney, sir.

Q. And did you have anything to do with the actual letting of the contract or preparation of the contract? A. No, sir.

572 Q. Did you learn when the contract was signed? A. I was advised that it had been signed.

Q. Do you recall about the date when that was? A. I would rather not recall. I don't remember exactly, sir.

Q. Do you know the date of the contract? A. I could refresh my memory from looking at some notes. I don't remember exactly when it was. I believe it was subsequent to the issuance of the permit.

Q. When you went to the site on the 28th, what general soil conditions did you find there? A. I have testified that I found a soil condition whereby the ground below the basement floor was of a granular sandy silt type material.

Q. Upon observing soil conditions of this kind following excavation, do you know what a reasonably skillful builder would do? A. Well, on knowing Mr. Abrams was an engineer in addition to his being a general contractor --

THE COURT: Just answer the question.

THE WITNESS: I would assume a reasonably skilled builder finding soil of this type would not excavate immediately to the fullest extent of the plans, but would rather protect the ultimate elevation of the excavation so that knowing it would have spillage that it would not be excavated to its fullest extent.

573

BY MR. CHANNING:

Q. Do the specifications give any directions concerning contacting you? A. They do, sir.

Q. Do you know what they say about that? A. They say that the contractor shall, upon finding any situations, contact the architect immediately.

Q. Would this be, in your opinion, a situation that would call for that, sir? A. I would very definitely say, yes.

* * * * *

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Q. Can you tell me exactly how the excavation should have been made? A. In my opinion, immediately upon breaking through the old basement floor and attempting to find a footing to establish whether the assumed footing was there or was not there and finding it was not in fact there, I should have been contacted before any excavation was done;

and further, no work at all should have been done on the site until I received certain articles, such as, insurance certificates and all which are requirements of the specifications.

* * * * *

Q. Can you describe for me what the supervisory services entailed? What was envisioned by supervisory services? A. They would be that I would make such inspections as would ensure the owner of getting the building for which the intent of the drawings were made; 575 and would ensure that any problems that arose during the construction, knowing that we were building on a site between old buildings, that I would examine it any time I was called; that I would make inspections at certain intervals, certainly as are required by the District: when footings are prepared, when walls are about to be closed in, when electrical work is completed. My specifications called for that and also called for visits to the site by myself and all of the bidders and their subcontractors previous to even bidding, much less previous to starting work.

Q. Prior to the 28th, were you ever called to come to the site?

A. I was not.

Q. Were you ever advised that the excavation had commenced?

A. I was not.

Q. Would you say that your duties would include going to the site prior to any call under these circumstances? A. I would certainly not, sir.

Q. Now, prior to preparing these plans and specifications, were you familiar with the area where the construction was to take place?

576 A. I was.

Q. Were you familiar generally with the subsurface conditions?

A. I was.

Q. Did you ever have any construction work near there or in the same area? A. Yes, sir.

Q. Where was that? A. Directly to the rear of this building on

the same alley, the structure at 1918 K Street which immediately abuts the rear of this, sir.

Q. Did you take this previous experience into account in connection with whether or not to advise soil boring tests? A. I took that plus other information I had accrued of a bank building which had just been built across the street where I found out the soil conditions on it.

Q. Now, you have told us about a soil boring test that was made after the damage to the buildings occurred. A. Yes, sir.

Q. Can you compare the results of that soil boring test with the assumptions that are set forth in your plans? A. I would say they are identical and prove a better weight bearing value than we indicated.

* * * * *

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CROSS EXAMINATION

BY MR. FRIEDMAN:

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Q. Now, did I understand you to testify on direct examination that when you draw these existing footings and you put the legend in "Existing footing," then you think it is the responsibility of the contractor to dig to find out whether there is an existing footing? A. I do, sir.

582

Q. Well then, would it be true, Mr. Dreyfuss, that after the contractor in your illustration started digging and found there were no existing footings, you would have to modify your plans, wouldn't you?

A. No, sir.

Q. What would you expect the contractor to do? A. Follow the specifications and get in touch with me.

Q. And after he got in touch with you and discovered there was no existing footing, what would you have him do? A. I would then have to make my determination, sir.

Q. Given this situation, would you determine that you would have to prepare different plans for different kind of footings and underpinning? A. I would not.

Q. What would you do? A. I would proceed with caution and diligence, knowing the situation, and construct the building, sir.

Q. Well, how would you make the provisions for tying into or constructing your footings underneath existing footings that are not there?

A. There are no plans that call for doing what you have just described, sir.

Q. Let me show you again page 3 of your drawing, Plaintiffs' Exhibit 52, where the words "existing footing" appear; Does not that show

583 that your new footing is to go directly under the existing footing and in contact with it, sir? A. That is the way it should have been built, sir.

THE COURT: No. Answer the question.

THE WITNESS: Yes, it does.

BY MR. FRIEDMAN:

Q. Now, will you tell me please, do you expect the contractor to build it that way when there is no existing footing? A. Sir, I have testified that there was an existing footing.

Q. Was there an existing footing as shown on your plan there, sir? A. This is an assumed shape. There was an existing footing and the building should have been built exactly as the plan is drawn.

* * * * *

584 Q. Now, Mr. Dreyfuss, you have testified that you have familiarity with the subsurface conditions around this area. A. I did, sir.

Q. What did that consist of, sir? A. You mean my experience?

Q. What was your familiarity with the existing subsurface conditions and will you describe what conditions you are referring to?

A. I designed a rear addition for a structure which was built in the rear of 1918 K Street, which is immediately to the rear of the rear of this building, and I found similar soil situations and I also investigated --

Q. Excuse me --

THE COURT: Let the witness finish his answer.

THE WITNESS: I also investigated the soil conditions on two other buildings that had been built within a half a block of this area and found

585 the stratification of the soil to be identical.

BY MR. FRIEDMAN:

Q. By that do you mean it was a granular, sandy soil? A. It was, sir.

Q. So that you knew before the construction commenced that at 1919 Eye Street there was a loose or sandy granular soil? A. I did, sir. I assumed that there was and figured that there was.

Q. And it actually turned out to be that? A. It sure did.

Q. It was based on that prior knowledge and information and familiarity that you did not advise the owner, Mr. Charron, to make soil tests? A. That is correct, sir.

Q. Did you in any place in your plans and specifications indicate by any words that the soil conditions were granular and sandy? A. No, sir, it is not an architectural interpretation.

Q. Sir? A. That is not an architectural interpretation.

586 Q. Well, I don't know that I quite follow you. I am simply trying to find out whether any place in your plans or specifications you described the soil conditions or the subsurface conditions at 1919 Eye Street to be granular, sandy soil? A. I did not put those words on the plans, sir.

Q. Did you put any similar words on the plans? A. No, sir; but I designed the building for that situation.

* * * * *

588 Q. Would you say, Mr. Dreyfuss, that after the razing had been completed at 1919 Eye Street that the adjoining walls of 1917 and 1921 Eye Street were in a more weakened condition than they were prior to the razing? A. I would, sir.

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594

JOHN H. BENNETT

called as a witness on behalf of the Defendant Dreyfuss, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHANNING:

* * * * *

Q. Are you a registered architect here in the District of Columbia? A. I am.

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Q. Now, are you familiar with test borings for soil bearing qualities? A. I have had a great many of them made, yes, and I analyzed them and used them in my business.

Q. Now, based upon your knowledge of what they are and your examination of the photographs, the plans and specifications for this job, do you have an opinion as to whether or not a reasonably skillful architect prior to preparing plans and specifications in this area would have made a soil boring test? A. In my opinion, for this building, in this location, in this area and of this complexity or lack of complexity of this building, I would not believe that a reasonably skillful architect would require boring tests to be made. These boring tests, of course, are made by the owner at his expense, not by the architect.

597

Q. But if such tests were to be made, it would be as a result of a recommendation of either an architect or a structural engineer, would it not? A. Yes. It would not be made without their recommendation or their location of the hole.

Q. You didn't mean to imply that the owner would make them without recommendation, did you? A. I am sure that the owner would not because he would not be in need of such information unless the architect indicated he would need it.

Q. Now, Mr. Bennett, did you examine a soil boring test report in this matter which is Defendant Lesmark's Exhibit No. 10? A. Yes, I examined this report.

Q. And did you examine the soil quality assumptions that are set forth in the plans? A. I did.

Q. Can you tell me whether there are any material differences between the results of the report and the assumptions set forth in the plans? A. In my opinion, the assumptions set forth in the plans were completely within the range of what was found in the boring test report
598 as it was done after the occurrence.

Q. Now, Mr. Bennett, are you familiar with a procedure called a test excavation to determine existing footings? A. I am familiar with it, but I --

Q. Just wait for the question, now.

Are you familiar with such a procedure? A. I am familiar with such a procedure.

Q. Now, based on your knowledge of this particular project, do you have an opinion as to whether a reasonably skillful architect in this area would have such test excavations made prior to preparing plans and specifications for this particular building? A. For this particular building, I would see no need for such test excavations to be made or any test excavation to be made.

* * * * *

599 Q. Mr. Bennett, let me point out to you on page 2 of 3 and on page 3 of 3, and ask you if these plans show footings to be in place under the existing party walls of 1917 and 1921? A. These drawings show existing footings under the existing party walls. Does that answer the question?

Q. Yes. Now, is this showing of footings under existing walls a customary procedure where no test excavations have been made?

A. It would be completely within the realm of what the architect would normally do.

Q. Mr. Bennett, how should these plans in this regard be interpreted by a contractor? A. As an assumption of the architect as to what existed below ground.

Q. Now, do these plans for this job in any place provide for a digging under or an excavating under the existing party walls of 1917 and 1921 Eye Street? A. No, they do not.

Q. * * *

* * * * *

600 Mr. Bennett, will you please examine the same photographs I have just referred to and tell me whether the builder in this instance excavated in accordance with the plans and specifications?

* * * * *

THE WITNESS: The excavation as shown in these photographs is not in accordance with the plans and specifications.

[BY MR. CHANNING:]

Q. And in what regard is it not in accordance with the plans and specifications? A. The excavation is below the lines shown on the drawings for the high part of the basement area, and it shows excavation under the existing footings of the existing walls.

601 Q. The first part of your answer, Mr. Bennett, would you explain what you mean by it was below the high point of the basement? A. Yes. There is a shelf of earth which is retained by a retaining wall and by footings and a slab on the top of this retaining area. That is shown to be left in place at the time the excavation is done. These photographs show that that area has been excavated below the lines shown on the drawings.

Q. Now, regarding the footings of the existing party walls at 1917 and 1921 Eye Street, can you tell me whether or not there were any types of footings on these walls? A. Yes, the photographs clearly show a footing under these existing walls.

Q. What type of footing is that? A. This footing is a masonry footing, and the dictionary definition of a footing is the enlargement of the wall as it bears on the soil beneath the wall; and any enlargement of the wall is a footing regardless of the material.

Q. This was not the type of footing that Mr. Dreyfuss drew in the plans, however, was it? A. I don't recall that he defined the

material or the type of footing that was under the existing walls. I think he just showed footings. I see the note, "Existing footing", but

602 I don't see anything saying that this footing is of any particular material or any particular design or size.

I have only examined this one drawing while I have been talking. There may be other indications, but on this drawing, there is only one indication and that is an existing footing without the description being greater than that.

* * * * *

CROSS EXAMINATION

BY MR. FRIEDMAN:

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607 Q. I direct your attention again to page 2 in the upper right-hand corner typical section and ask you if they do not require and show that the new footings are to be immediately underneath the existing footings of the party wall of 1917 Eye Street? A. Yes, I know the section. Yes, they do occur. At certain points, the piers and footings do go under the existing footing, but not under the existing wall. In my testimony before, it said the wall.

* * * * *

608 Q. And then when the actual condition demonstrates there are no footings under the existing wall or footings of only one or two inches, what is the builder to do, sir? A. Notify the architect immediately.

Q. Is he supposed to build under that wall? A. No, he is supposed to notify the architect.

Q. And what would you have the architect require him to do, sir, with respect to the existing -- A. I am sorry but I couldn't from this point tell you what the architect would tell the builder to do; but if the builder goes beyond the point where the stability of the adjoining buildings is endangered, he is not doing his job if he doesn't inform the architect immediately so that the remedies can be made.

Q. You are unable to tell us how he is going to construct new

footings under those conditions. A. No -- wait a minute. That isn't what I thought you said. I said that I felt that as soon as he found there were, you say, no footings or very small footings; I say larger footings -- the builder should have notified the architect immediately about this condition so that a change in design could be made if necessary. I don't think any change was necessary.

* * * * *

613

ISABEL C. FENTON PRYCE

recalled as a witness on rebuttal, having been previously duly sworn, resumed the witness stand, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

Q. Mrs. Pryce, I believe Mr. Abrams testified yesterday that the front wall of your building had never been painted prior to the time of this accident. Would you state what the facts are with reference to that?

A. When I originally renovated the building in 1946-47, I painted the exterior of the front white. Approximately five or six years later, I

614

painted it gray and at a still later time, I painted the trim of the front gray because the face of the building was not in need of repainting at that time.

Q. Now, as a result of these channel irons and the tie rods that were placed in the front part of the building, what was the condition after that work was completed but before the painting? Could you describe the appearance? A. The front of the building had very obviously been worked on for making it structurally safe again and in order to entice new tenants into the building, I felt it advisable to try to cover this up and disguise it as much as possible.

Q. What was the color of these rods that were tied in, that is, the ends? A. The star bolts were black as they came from the supplier. The channel iron which Mr. Abrams covered with a down-spout, Mr. Abrams said that at some later date he would have his men slap a little paint on it.

Q. Did they do that? A. No, they didn't.

Q. Now, did Mr. Abrams perform all of the work that he had agreed to do in your building? A. He performed all the work that he felt he should do; he did not perform all the work that I asked him to do.

615 Q. What work did you ask him to do that he did not perform?

A. I asked him to restore the rear of the building to the condition in which it had been prior to the accident. I asked him to paint the front of the building to repair the damage that was caused by the accident, and to paint the fire escapes which had been badly filled with plaster and litter and dust that had been thrown out onto the fire escapes in the process of cleaning up the interior work in the building.

Q. Is the fire escape on the front? A. No, it is not.

Q. Where is the fire escape? A. The fire escape is on the side between 1917 and 1919 Eye Street.

* * * * *

617 Q. As you did visit the building from time to time, what did you observe with reference to the size of the cracks or additional cracks, if anything? A. When I went in on that Thursday, great sections of the plaster had fallen out and as more bracing and shoring was put up in between the buildings, more plaster fell off the walls both on the side wall of 1917 and on the wall that abutted the side wall.

Q. The lateral wall? A. The lateral wall.

Q. And after Mr. Abrams had finished his plastering, did you have occasion to inspect that? A. Yes, I did have occasion to because some
618 of the plaster that Mr. Abrams replaced had to be touched up again because further cracks appeared in it and I think at the time that that was due to putting the --

Q. Just what you saw. A. I'm sorry.

Q. Now, over what period of time would you say, from the time you made your first inspection of the building as a whole until the last time that you inspected it, did you observe additional cracks occurring?

A. Well, additional cracks appeared in the west wall of the building even

after I had completed the work that I had done in the building and while I was trying to both rent and sell it. Small cracks appeared in the plaster.

Q. On which wall? A. On the west wall and some on the lateral wall also.

Q. When you say on the west wall, on what floors? A. On the first and third floors, I am sure about; the other floors, I am not, and the basement.

Q. Did you observe from time to time the bracing that was between the two buildings being removed? A. Yes, and I was very concerned about --

* * * * *

619 Q. Did you observe whether or not the removal of the bracing had any effect insofar as the causing of cracks was concerned? A. Yes, and I so reported to the District authorities and found that the bracing had been removed without getting permission from the District first.

Q. That is not part of the question. A. I am sorry.

Q. You did observe these cracks? A. I did observe them.

* * * * *

623

ROBERT ASH

called as a witness on rebuttal, having been previously duly sworn, resumed the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PECHACEK:

Q. Mr. Ash, I hand you Defendant Lesmark's Exhibit No. 13 which is Mr. Manuccia's report with reference to your building. Have you had an opportunity to examine that? A. Yes, I have.

Q. First of all with reference to a crack in the north wall in the basement of your building which Mr. Manuccia reports that he saw, would you indicate the facts with reference to that? A. Well, he says there is a crack on the north wall about 14 feet from the west wall. He is in error. There never has been any appreciable crack other than small ones in that wall. It just wasn't there, never has been.

Q. What about in that portion of the building along the east wall?

624 A. On the east wall, we had at least three cracks that ran the whole height of the building.

Q. Now then, Mr. Ash, during the period of time when the bracing that was erected between the two buildings was being taken down, did you have occasion to observe whether additional cracks appeared in your building? A. Additional cracks appeared and more plaster fell off.

Q. Where did the plaster fall off? A. Well in various rooms. It's a little hard for me to remember. The plasterers were in there three or four times.

Q. Did any plaster fall from the ceiling? A. I believe there did, yes.

Q. Do you know on which floors? A. I wouldn't know and I wouldn't attempt to pinpoint it.

Q. What about from the walls? A. Well, it fell from the walls too. That is why we had to have the plasterers come back.

Q. How about the lateral walls? A. The cracks in the lateral walls increased as this building was in process of erection and they would knock off the bracing against my wall.

Q. Over how long a period, approximately, did you have occasion
625 to observe new cracks? A. They ran at least until the first part of 1960.

Q. Did you observe with reference to any old cracks whether they got longer or whether they widened any? A. Yes, the cracks widened as the building next door progressed.

Q. And over how long a period of time? A. Well, as I say until the early part of 1960.

* * * * *

[Filed May 20, 1963]

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS

1

Washington, D.C.
Wednesday, Nov. 1, 1962

* * * * *

2

CLOSING ARGUMENT ON BEHALF OF DEFENDANTS CHARRON
BY MR. EDGERTON

MR. EDGERTON: * * *

Now, it being a contractual indemnity, Your Honor, it does provide for costs and counsel fees. I submit that and I think Your Honor has held and I know other judges of this Court have held that where there is this express contractual indemnity applying for counsel fees, the counsel fees are an appropriate part of the indemnification. Not otherwise: I think if it is implied indemnity, the authority is not nearly so clear there for allowance of counsel fees and expenses; but where it is part of the express contractual indemnification, counsel fees would be allowable. So I think it would be appropriate for that reason.

Of course, whatever amount of counsel fees Your Honor would fix would be entirely agreeable but I might just point out to Your Honor that I have been checking our time records in this case. Outside of the actual trial time in court, which Your Honor is familiar with -- we have had five full trial days here -- it is 50 hours of service outside of the court time.

3

THE COURT: What is your customary fee on an hourly basis for work outside of the court?

MR. EDGERTON: Outside of the court, I would say \$25.00 an hour would be fair these days; and for the court time, I would --

THE COURT: Is this what you charge or what you hope for?

MR. EDGERTON: We try to charge that. We don't always get that, sometimes more.

For court time, I would say \$200.00 a day.

From a rough calculation, that would be \$2,250.00 total counsel fees.

* * * * *

THE COURT: There is one item I don't recall your commenting on, Mr. Friedman. Mr. Edgerton asked for a fee against your client in the approximate amount of \$2,250.00. I do not recall you making any statement with respect to that.

MR. FRIEDMAN: We are not prepared to pay any fees today, Your Honor.

There is nothing I can say about it. If Your Honor wants me to comment on the reasonableness of it, I --

THE COURT: I just wanted to make certain that you didn't overlook the item.

MR. FRIEDMAN: Yes.

No, I can't comment on it except to say that if I were in Mr. Edgerton's position, I would simply claim the same thing. This is fair and reasonable compensation if he is entitled to it.

* * * * *

[Filed November 9, 1962]

ORAL RULING OF THE COURT

1

Washington, D.C.
Thursday, Nov. 1, 1962

The above-entitled causes came on for further trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia.

* * * * *

2

THE COURT: Thank you, gentlemen, for your careful and orderly presentation of this case. The Court especially appreciates the fact that in a case of this kind in which lawyers' tempers are frequently frayed by the duration of the trial and the sometimes unhappy testimony of witnesses that you gentlemen have maintained a dignified professional calm, both towards each other and towards the witnesses. The Court, of course, expects this calm to be displayed to the Court.

The Court finds upon the basis of the testimony, with reference to the action of the plaintiffs Isabel C. Pryce and Robert Ash against the defendants Walter S. and Marie L. Charron and Lesmark, Inc., in favor of these plaintiffs. The Court finds that the evidence predominates in favor of the claims of these plaintiffs in the amounts to be enumerated hereafter.

In finding the defendants Walter S. and Marie L. Charron liable, the Court does so upon the premise that as owners they have a liability established in law.

The Court further finds that the proximate cause of the damage to these plaintiffs was the negligence of the defendant Lesmark, Inc. in making the excavations which resulted in the vertical movement of the walls of the premises at 1917 I Street and 1921 I Street. In using

3 the word "vertical" movement, the Court recognizes that there is some testimony of other than vertical movement especially in the front of the building at 1917 I Street. The Court further recognizes, as I believe I indicated by an earlier comment or question late in the course of the trial, that the so-called shoring process which was designed to give lateral support to the buildings of the plaintiffs not only did not, apparently, stop the vertical movement but the placing of the shoring and its subsequent removal, as indicated by the testimony, undoubtedly resulted in some additional damage to the plaintiffs' properties which, the Court believes, accounts for some discrepancy among the several mechanics who testified as to the condition on different occasions.

The Court, then, will award judgment to the plaintiff Isabel C. Pryce against the defendants Walter S. and Marie L. Charron and the defendant Lesmark, Inc. in the following amounts:

First as to the repairs of the premises at 1917 I Street, Northwest, the following specific items: the bill of Mr. Whiting in the amount of \$390.00; the bill of the Adams Decorating Company in the amount of \$2,469.00; the bill of the linoleum man, Mr. Gotts, in the amount of \$348.75. The Court has discounted this bill in the amount of \$200.00

4 because of the testimony as to the fact that this item related to the replacement of a prior linoleum floor. I believe that under the circumstances, there was an enhancement to the value of the premises by the asphalt tile or more expensive flooring utilized. I have, consequently, reduced this claim by \$200.00.

The Court will allow this plaintiff the amount of \$29.78 representing the bill of the Wizard Locksmith people. The Court will allow the amount of \$292.75 representing the expenses of the engineer, Mr. Locraft; and the amount of \$149.00, representing the cost of removing and carrying away debris; and the bill of the Electrical Associates in the amount of \$420.89.

The Court does not allow the bill of \$31.65 for Ligon since the testimony indicated that this bill was fundamentally for retaping of venetian blinds. I do not think that retaping is a repair item.

This, then, makes the amount allowed by the Court for repairs \$4100.00. The Court has rounded this figure. If counsel add carefully, they will find a discrepancy of \$1.65 in the total of that amount. I have rounded the figure in the interest of facilitating the total amount of the judgment.

5 The Court will award to this plaintiff the items of loss of rent, plus the incidents described as heat and maintenance of the building during this period in the total amount of \$9,800.00; and the Court will award to this plaintiff damages in the amount of \$7500.00 representing the difference between the price at which the plaintiff sold her building and the price which the building subsequently commanded when it was sold or re-sold a year or two later. The Court believes that the best test of the market value of these premises at or about the time of these sales was the price at which the property was sold a year or two after the so-called accident and after the elimination of the so-called bad reputation or other elements of damage.

This then totals an award to this plaintiff in the amount of \$21,400.

The Court will award to the plaintiff Robert Ash damages in the amount

of \$3,472.00 representing the claims of Lee in the amount of \$1170.00; the claim for restoration of plaster in the amount of \$175.13; the Conway claim which the Court has reduced to the amount of \$67.21 in the light of the testimony given upon this bill. The Court will include in its award to the plaintiff Ash the claim of the Hamilton Decorators in the amount of \$1515.75; the claim of Ash, Incorporated in the amount of \$47.07; the Locraft claim in the amount of \$270.25; the Smithers claim in the amount of \$37.00; the Davis claim in the amount of \$58.00.

6 I have also discounted the Madden claim, further in light of the testimony that some of this expense represented the replacement of rusty water pipes.

The total award to the plaintiff Robert Ash will be in the amount of \$3,472.00, which is the total remaining after the reductions which the Court has enumerated.

Upon the cross-claim of the defendants Charron against the defendant Lesmark, Inc., the Court finds, I repeat, that the cause of the damage in this case was the negligence of the corporate defendant Lesmark, Inc. The Court believes that under the evidence in the case, the defendants Charron are entitled to complete indemnity from the defendant Lesmark for any liability incurred by the Charrons as a result of the judgment in favor of the plaintiffs in this case.

Is there a cross-claim of the defendants Charron against the defendant Dreyfuss?

MR. EDGERTON: Yes, Your Honor.

THE COURT: Upon the cross-claim of the defendants Charron against the defendant Dreyfuss for indemnity in this case, the Court finds for the defendant Dreyfuss.

With reference to the claim of the defendants Charron in their cross-claim for counsel fees and costs against the defendant Lesmark, the Court finds in favor of the defendants Charron in the amount of \$2,000.00.

7 Upon the cross-claim of the defendant Charron against the defendant Dreyfuss, I repeat, the Court finds for the defendant Dreyfuss.

The Court will grant the oral motion of the defendant Lesmark to amend the pleadings to file a cross-claim against the defendant Dreyfuss. The Court is doing so because, as counsel knows, the Court is required by Court of Appeals opinions to permit amendment of pleadings even up to the termination of evidence in the case.

Upon the oral cross-claim of the defendant Lesmark against the defendant Dreyfuss, the Court finds for the defendant Dreyfuss.

Counsel will submit findings of fact and conclusions of law to carry out the Court's oral rulings upon the matters pending before the Court.

PLAINTIFF'S EXHIBIT 53A.I.A. SHORT FORM FOR SMALL CONSTRUCTION CONTRACTS

[Filed May 20, 1963]

AGREEMENT AND GENERAL CONDITIONS
 BETWEEN CONTRACTOR AND OWNER

* * * * *

GENERAL CONDITIONS

ARTICLE 1

CONTRACT DOCUMENTS

The contract includes the Agreement and its General Conditions the Drawings, and the Specifications. Two or more copies of each, as required, shall be signed by both parties and one signed copy of each retained by each party.

The intent of these documents is to include all labor, materials, appliances and services of every kind necessary for the proper execution of the work, and the terms and conditions of payment therefor.

The documents are to be considered as one, and whatever is called for by any one of the documents shall be as binding as if called for by all.

* * * * *

[Filed March 20, 1963]

PLAINTIFF'S EXHIBIT 58

SPECIFICATIONS FOR PROPOSED STORE FOR
 MR. WALTER S. CHARRON TO BE ERECTED AT
 1919 EYE STREET, N. W., WASHINGTON, D. C.

* * * * *

13. Insurance:

* * * * *

(e) Should any person or persons or property be damaged or injured, including injuries causing or resulting in death, by the contractor,

or by any sub-contractor, or by any person or persons employed under them, in the course of the performance by them of this agreement, or otherwise resulting from any action or operation under this agreement, whether by negligence or otherwise, said contractor shall alone be liable, responsible and answerable therefor and does hereby agree, to and with the said Owner, to hold harmless and indemnify the Owner of and from all claims, suits, actions, costs, counsel, fees, expenses, damages, judgments or decrees by reason thereof.

* * * * *

[Filed November 21, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISABEL C. FENTON,)	
Plaintiff)	
)	
v.)	C. A. NO. 2364-59
)	
WALTER S. CHARRON, et al,)	
Defendants)	
)	
and)	
)	
ROBERT ASH,)	
Plaintiff)	
)	
v.)	C. A. NO. 3506-59
)	
WALTER S. CHARRON, et al,)	
Defendants)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned causes of action were consolidated for trial pursuant to order of this Court. The parties hereto waived trial by jury and said causes were thereafter tried by the Court without a jury. After a full hearing in open Court and consideration of the pleadings, the

evidence adduced, the stipulations of counsel, and the oral arguments of counsel, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff, Isabel C. Pryce, owned Lot 807 in Square 86, improved by premises 1917 Eye Street, N. W., in the District of Columbia. The said premises had been rented to tenants for use as office space since 1946. In July, 1959, the building was in a good, tenantable condition and the entire premises were leased on a month to month tenancy to M. Belmont Ver Standig, Inc., at a rental of \$805.00 per month, with the owner providing janitor and char services, utilities, heat and elevator service.

2. The plaintiff, Robert Ash, owned Lot 30 in Square 86, improved by premises 1921 Eye Street, N. W., in the District of Columbia. Said premises were used as office space and in July, 1959, were occupied by the owner and his law firm.

3. The defendants, Walter S. Charron and Marie L. Charron owned Lot 29 in Square 86, known as 1919 Eye Street, N. W., in the District of Columbia.

4. The defendant, Edmund W. Dreyfuss, registered Architect, contracted with the defendants, Walter S. and Marie L. Charron to prepare plans and specifications for the erection of a new building on said Lot 29 in Square 86, and to perform supervisory services in connection therewith.

5. The defendants, Walter S. Charron and Marie L. Charron, applied to the District of Columbia Government for a building permit to erect a new building on said Lot 29 in accordance with the plans and specifications of the Architect. The said plans were approved by the District of Columbia and permit number B50246 was issued to said owners on July 17, 1959, for the erection of said building.

6. The said owners entered into a contract with the defendant, Lesmark, Inc., a Maryland corporation, on July 17, 1959, for the construction of said building on Lot 29, the same to be erected in accordance

with the approved plans and specifications.

7. The east wall of the property located at 1917 Eye Street and the west wall of the property located at 1921 Eye Street were party walls which were to enclose the two sides of the new building to be constructed on Lot 29.

8. On July 21 and 22, 1959, the defendant, Lesmark, Inc. performed the general excavation incident to the erection of the new building in accordance with the plans and specifications. On July 23, 1959, Michael M. Abrams, President of Lesmark, Inc. inspected the excavation and determined that it was satisfactory and that the said party walls were in good condition.

9. On July 27, 1959, the site at 1919 Eye Street, N. W., was inspected by James W. Harris, Inspector, Department of Licenses and Inspections, District of Columbia Government. He determined that the general excavation was properly done. At that time there were no cracks or other evidence of damage to the buildings of the two plaintiffs.

10. The plans did not provide for the making of any excavations beyond the face of the two party walls. Excavations for footings were to be made on said Lot 29 at certain points up to the faces of the two party walls, but not beyond.

EW 11. On July 28, 1959, at about 7:30 A.M., the defendant, Lesmark, Inc., caused numerous pits or excavations to be dug ^{by hand} under both of the EW said party walls. These ^{pits or} excavations were made at points other than where the plans called for footings to be placed along the faces of the party walls and were directly under the two party walls. No support of any kind was provided by Lesmark, Inc., for the said party walls in connection with these excavations.

EW 12. The said ^{pits or} excavations under the party walls were in violation of the plans and specifications and of the applicable Building Regulations of the District of Columbia Government. Lesmark, Inc. was negligent in making these excavations and this negligence was the proximate cause of the damage resulting to the buildings of the two plaintiffs.

EW

13. Immediately following the making of said ^{pits or} excavations on July 28, 1959, cracks began to appear in both party walls and in the front wall of the building at 1917 Eye Street, N. W. Cracks also appeared in various rooms in both buildings. The District of Columbia Government ordered the contractor, architect and the owners of Lot 29 to take immediate steps for placing concrete in the holes left as a result of said excavations. Also, they were ordered to place shoring or bracing between the two party walls as a means of providing support therefor.

14. As a result of the damage to the premises at 1917 Eye Street, N. W., on July 28, 1959, the District of Columbia Government ordered the tenant to immediately vacate the building.

15. - As a result of the movement of the party walls and the front wall of the 1917 Eye Street building, and of the cracks in the walls, plaster was loosened or fell from the walls and ceilings of many rooms in both buildings. Many doors and windows in both buildings were caused to be out of plumb and would not open and close and the floors in several of the rooms at 1917 Eye Street, N. W., were racked and slanted out of level. The elevator in the building at 1917 Eye Street, N. W., was ordered closed by the District of Columbia Government and the shaft, electrical equipment and cable with respect thereto, were damaged and required repair. In the building at 1921 Eye Street, N. W., in addition to the cracks occurring, the ceramic tile on the floor and walls of two of the wash rooms buckled and broke away. The movement of the party wall at 1921 Eye Street, N. W. caused a leak in the roof and in a water pipe.

16. The placing of the shoring or bracing between the party walls caused additional cracks and further falling of plaster to occur in both buildings. The shoring was removed in stages as construction of the new building progressed, and further cracking of the walls in both buildings occurred during the course of the removal of said bracing.

17. On July 29, 1959, the District of Columbia Government ordered the contractor and owners of Lot 29 to temporarily shore and make safe

the buildings at 1917 and 1921 Eye Street, N. W., and to submit plans and procedures, and obtain approval of the same, for permanently restoring the said buildings.

18. The contractor and owners of 1919 Eye Street, N. W., failed to comply with the provisions of the directive of July 29, 1959 of the District of Columbia Government and the plaintiff, Pryce, obtained a temporary restraining Order, issued by this Court on September 9, 1959, enjoining the contractor, architect and owners from proceeding with construction on 1919 Eye Street, N. W., until the building at 1917 Eye Street, N. W., was made structurally safe. Said Order was continued in effect by the Court, with the consent of the parties, for an extended period of time while Lesmark, Inc., completed the structural repairs to the building at 1917 Eye Street, N. W. Thereafter, Lesmark, Inc., made some interior repairs in the front portion of the building at 1917 Eye Street, N. W. In making these repairs, Lesmark, Inc., caused and permitted debris to accumulate in many of the rooms in the rear portion of this building, which, with the other damage resulting, made necessary the redecoration of these rooms. The making of the structural repairs to the front of the building at 1917 Eye Street, N. W., made it necessary to repaint the front of said building. Lesmark, Inc., and the owners of 1919 Eye Street, N. W., did not make all of the repairs required for the building at 1917 Eye Street, N. W., and they made no repairs to the building at 1921 Eye Street, N. W.

19. On July 31, 1959, M. Belmont Ver Standig, Inc., the tenant in the building at 1917 Eye Street, N. W., notified the owner of said building in writing that it would vacate the premises on or before August 31, 1959. The tenant also advised that it would not pay rent for the month of August, 1959, because the said premises were made untenable and as the tenant was evicted therefrom by reason of the untenable conditions.

20. The owner of the building at 1917 Eye Street, N. W., listed her property for rent with a local real estate agent in December, 1959. Thereafter, she listed the property for sale or rent with several real

estate agents in the District of Columbia. The owner was unsuccessful in obtaining a tenant or tenants for her building. She sold the property for \$67,500.00, conveying title thereto, pursuant to said sale, on December 15, 1960. The plaintiff, Pryce, made diligent efforts to obtain a tenant or tenants or a purchaser for said premises. It was stipulated by counsel that the repairs to the building at 1917 Eye Street, N. W., were completed by March 1, 1960.

21. Permanent damages were sustained to the building at 1917 Eye Street, N. W. The items constituting such damages include the racking of the floors, which could not be repaired, the exterior cracks to the front of the building, the fact that the building was caused to be vacant, and the bad reputation the building acquired as a result of the accident. The result of the permanent damages caused to the building reduced the market value of the property by the sum of \$7500.00, which will be awarded to the plaintiff, Pryce, as an item of damage.

22. The plaintiff, Pryce, sustained a loss of rent from her property for the period from August 1, 1959, through December 15, 1960, computed as follows:

Gross rental @ \$805.00 per month	\$ 13,865.00
Less: Adjustment for services normally supplied by owner, based on the average monthly cost thereof for the years 1957 and 1958 in the sum of about \$345.00 per month	5,865.00
	<u>\$ 8,000.00</u>
Add: The cost of heat, light and maintenance during the period when repairs were being made and during the showing of the property for rent or sale	1,800.00
	<u>\$ 9,800.00</u>

The sum of \$9,800.00 will be awarded to the plaintiff, Pryce, for loss of rent.

23. The plaintiff, Pryce, is awarded the sum of \$4,100.00, for repairs to her property, made necessary as a result of the damages sustained to her property, as follows:

Whiting Elevator Co., Inc.	\$ 390.00
Adams Renovating Company, Inc.	2,469.00
Gott's Linoleum, Inc.	348.75
Wizard Locksmith Company	29.78
Bernard F. Locraft	292.75
Debris and trash removal	149.00
Electrical Associates	420.89
Total rounded to -	<u>\$ 4,100.00</u>

24. The plaintiff, Ash is awarded the sum of \$3,472.00 for repairs to his property at 1921 Eye Street, N. W., sustained as a result of this accident, as follows:

A. W. Lee, Inc.	\$ 1,170.00
A. W. Lee, Inc.	175.13
J. W. Conway, Inc.	67.21
Hamilton Decorating Co.	1,515.75
Frances Luna Ash, Inc.	47.07
Bernard F. Locraft	270.25
Smither & Company	37.00
Davis, Wick, Rosengarten Co., Inc.	58.00

The foregoing claims plus such sums on the claims of James J. Madden and Standard Floors, Inc. are allowed so as to bring the amount of this award to the sum of \$3,472.00.

25. The total amounts to be awarded to the plaintiffs, and against the defendants, Walter S. Charron, Marie L. Charron and Lesmark, Inc., are as follows:

To plaintiff, Isabel C. Pryce	\$ 21,400.00
To plaintiff, Robert Ash	3,472.00

26. The defendants, Walter S. Charron and Marie L. Charron, are entitled to complete indemnity from the defendant, Lesmark, Inc., for liability incurred by them as a result of the judgments being entered herein in favor of the plaintiffs.

27. The sum of \$2,000.00 is awarded in favor of the defendants, Walter S. Charron and Marie L. Charron and against the defendant, Lesmark, Inc., for counsel fees and costs, as provided in the contract entered into between said parties and the specifications for construction of the new building at 1919 Eye Street, N. W.

28. The defendants, Walter S. Charron and Marie L. Charron are not entitled to indemnity on their cross claim against the defendant, Edmund W. Dreyfuss, in these cases.

29. The defendant, Lesmark, Inc., is not entitled to recover on its oral cross claim against the defendant, Edmund W. Dreyfuss.

Conclusions of Law

1. That the plaintiff, Isabel C. Pryce shall have judgment for the sum of \$21,400.00, and the plaintiff, Robert Ash shall have judgment for \$3,472.00, both of said judgments to be entered against the defendants, Walter S. Charron, Marie L. Charron and Lesmark, Inc. The liability of the defendants, Walter S. Charron and Marie L. Charron is established by law by reason of their being the owners of 1919 Eye Street, N. W.

2. That the defendants, Walter S. Charron and Marie L. Charron shall be entitled to a judgment against Lesmark, Inc., in the sum of \$2,000.00, for counsel fees and costs, and shall also be entitled to a judgment against Lesmark, Inc., for the amount of liability incurred against the said Walter S. Charron and Marie L. Charron by reason of the judgments to be entered herein against them and in favor of the two plaintiffs.

3. The defendant, Edmund W. Dreyfuss, shall be entitled to a judgment on the cross claim against him by the defendants, Walter S. Charron and Marie L. Charron.

4. The defendant, Edmund W. Dreyfuss, shall be entitled to a judgment on the cross claim against him by the defendant, Lesmark, Inc.

/s/ Edward A. Tamm
Judge

[Certificate of Service]

[Filed November 21, 1962]

JUDGMENTS

The above-entitled causes of action having come on for trial before the Court without a jury, and after a full hearing in open Court and

consideration of the pleadings, the evidence adduced, the stipulations of counsel, and the oral arguments of counsel, and the Court having filed its findings of fact and conclusions of law herein, it is by the Court on this 21st day of November, 1962.

ORDERED, That the plaintiff, Isabel C. Pryce, have judgment against the defendants, Walter S. Charron, Marie L. Charron and Lesmark, Inc., in the sum of Twenty One Thousand Four Hundred Dollars (\$21,400.00), together with interest thereon at the legal rate from the date hereof and the costs of this action, and it is,

FURTHER ORDERED, That the plaintiff, Robert Ash, have judgment against the defendants, Walter S. Charron, Marie L. Charron and Lesmark, Inc., in the sum of Three Thousand Four Hundred and Seventy Two Dollars (\$3,472.00), together with interest thereon at the legal rate from the date hereof and the costs of this action, and it is,

FURTHER ORDERED, That the defendants, Walter S. Charron and Marie L. Charron, have judgment against the defendant, Lesmark, Inc., in the sum of Two Thousand Dollars (\$2,000.00), together with interest at the legal rate from the date hereof, and it is,

FURTHER ORDERED, That the defendants, Walter S. Charron and Marie L. Charron have judgment against Lesmark, Inc., for the full amount of liability incurred against the said Walter S. Charron and Marie L. Charron by reason of the aforesaid judgments entered against them herein and in favor of the plaintiffs, Isabel C. Pryce and Robert Ash, and it is,

FURTHER ORDERED, That the cross claims of the defendants, Walter S. Charron, Marie L. Charron and Lesmark, Inc., against the defendant, Edmund W. Dreyfuss, be and the same are hereby dismissed, with costs to the defendant, Edmund W. Dreyfuss.

/s/ Edward A. Tamm
JUDGE

[Certificate of Service]

[Filed November 30, 1962]

**MOTION ON BEHALF OF DEFENDANT LESMARK, INC.,
FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR REMITTITUR**

The defendant Lesmark, Inc., respectfully moves this Court for a new trial or, in the alternative, for a remittitur of the judgment awarded the plaintiffs herein for the following reasons:

1. The findings and judgment are not supported by the evidence.
2. The evidence does not support a finding and judgment against this defendant because said defendant was not negligent in performing his work in accordance with the plans and specifications or, if negligent, such negligence was not the proximate cause of the damage complained of herein.
3. The said defendant Lesmark, Inc., performed the work required of it in accordance with the plans and specifications furnished by the owners Charron by and through their agent Dreyfuss.
4. Said defendant Lesmark, Inc., relied upon the defendant Dreyfuss that the adjoining walls of the property owned by the respective plaintiffs were supported by their own footings and foundations.
5. There is no support in the evidence for finding No. 16 with respect to the shoring or bracing of the party walls and, at all events, this was required by the District officials.
6. There is no evidence to support finding No. 21 with respect to the item of \$7,500.00 for alleged reduction in market value of the property at 1917 Eye Street, N. W.; and it is respectfully requested that the Court order a remittitur of the sum of \$7,500.00 for such item.
7. There is no support either in law or in fact for finding No. 22 with respect to the allowance of the rental in the amount of \$9,800.00. In the alternative, this Court should order a remittitur of said award for loss of rent in the sum of \$5,780.00; so that the net loss of rent recoverable would be only for the period August through December 1959.
8. The award of \$4,100.00 provided in finding No. 23 is grossly excessive because the evidence does not support such an award and the Court did not allow for normal wear and tear in said finding; and the

, Court should order a remittitur of all or part of said amount.

9. The award of \$3,472.00 provided in finding No. 24 is grossly excessive because the evidence does not support such an award and the Court did not allow for normal wear and tear in said finding; and the Court should order a remittitur of all or part of said amount.

10. The award of counsel fees in finding No. 27 has no basis in the evidence or in law. Counsel for the defendants Charron was in fact counsel for Charron's insurance company and no showing is made that the defendants Charron themselves incurred said cost or expense. There is no testimony with regard thereto and the award is based solely upon the statement of counsel for the defendants Charron in his closing argument to the Court as to the value of his services rendered. A remittitur of said amount in full should be ordered.

11. The awards to the respective plaintiffs are grossly excessive, not supported by the evidence, and should be set aside.

12. And for such other and further reasons apparent of record and which will be presented to this Court at the argument in support of this motion.

BARKER & SAVITS

/s/ Samuel Barker

/s/ Maurice Friedman

Attorneys for Defendant Lesmark, Inc.

[Certification of Mailing]

[Filed November 30, 1962]

AFFIDAVIT OF SAMUEL BARKER

DISTRICT OF COLUMBIA, ss:

SAMUEL BARKER, being first duly sworn, on oath deposes and says that he is counsel of record for Lesmark, Inc., one of the defendants in the above-entitled cause, and submits this affidavit in support of said defendant's motion for a new trial, to which this affidavit is attached.

He is informed and advised by Justin L. Edgerton, Esquire, counsel of record for the defendants Charron herein, that his law firm, Pledger & Edgerton, while attorneys of record herein for said defendants Charron, is actually employed by the insurance company for the defendants Charron, and that said insurance company is obligated for and will be required to pay the bill of said law firm of Pledger & Edgerton for their services rendered herein; and that the defendants Charron are neither obligated nor responsible for the fee which may be due to said law firm of Pledger & Edgerton for their services rendered in this cause.

/s/ Samuel Barker

[Jurat dated November 29, 1962]

[Filed January 16, 1963]

ORDER DENYING MOTION FOR NEW TRIAL OR, IN THE
ALTERNATIVE, FOR REMITTITUR

Defendant, Lesmark, Inc., having filed a motion herein for a new trial or, in the alternative, for a remittitur of the judgments entered herein in favor of the respective plaintiffs, and answers in opposition thereto having been filed by the plaintiffs and by the defendants, Walter S. Charron, Marie L. Charron and Edmund W. Dreyfuss, and after argument on said motion in open Court, and full consideration having been given thereto, it is by the Court on this 14th day of January, 1963,

ORDERED, That the motion of the defendant, Lesmark, Inc., for a new trial or, in the alternative, for a remittitur of the judgments entered in favor of the respective plaintiffs, be and the same is hereby denied.

/s/ Edward A. Tamm
JUDGE

[Certificate of Service]

[Filed February 13, 1963]

NOTICE OF APPEAL

Notice is hereby given this 12th day of February, 1963, that LESMARK, INC. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of November, 1962 in favor of ISABEL C. PRYCE, WALTER S. CHARRON, MARIE L. CHARRON, ROBERT ASH And EDMUND W. DREYFUSS against said LESMARK, INC.

/s/ Samuel Barker
Attorney for Lesmark, Inc.

* * * *

BRIEF FOR APPELLEE, DREYFUSS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,739

No. 17,740

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1963

Nathan J. Paulson
CLERK

LESMARK, INC.,

Appellant, ,

v.

PRYCE, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES E. CHANNING, JR.

1625 K Street, N.W.
Washington 6, D.C.

Attorney for Appellee, Dreyfuss

STATEMENT OF APPELLEE DREYFUSS
OF QUESTIONS PRESENTED

1. Whether the trial court's finding that Lesmark, Inc. was negligent in making certain excavations and that such negligence was the sole proximate cause of the damage to the buildings of appellees Pryce and Ash is "clearly erroneous".

2. Was the trial court's action clearly erroneous when it made no finding that appellee Dreyfuss was negligent and that such negligence was a proximate cause of the damage to appellees, Pryce and Ash.

3. Where the trial court found that the proximate cause of the damage to the buildings of appellees, Pryce and Ash, was the negligence of appellant Lesmark, Inc. did the trial court then err in finding that Lesmark, Inc. was not entitled to recover on its oral cross claim against appellee, Edmund W. Dreyfuss.

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BRIEF FOR APPELLEE, DREYFUSS

COUNTERSTATEMENT OF THE CASES

Appellee Dreyfuss incorporates by reference the
"Counterstatement of the Cases" set forth in Brief for Appellees
Pryce and Ash.

SUMMARY OF ARGUMENT

Appellant Lesmark, Inc. has charged in counsel's Summary of Argument that this court should reverse the trial court "because the contractor should not be held liable for following the plans and specifications as prepared by the owner's architect". (Appellant's Brief, p. 5)

The facts show that Appellant-Contractor excavated under the party walls when the plans showed that no such excavations were to be made. Therefore, the contractor did not follow the plans.

The contractor contends that he assumed that the party walls were supported by a footing that did not exist and that he proceeded on this assumption. The facts, however, show that when the very first shovel went under each of the party walls that the contractor knew exactly how the walls were supported. He knew they were supported by a continuous masonry footing. Nevertheless, and thereafter he proceeded to overexcavate beyond the excavation authorized by the plans.

The findings of facts and conclusions of law were not "clearly erroneous".

ARGUMENT

The architect Edmund W. Dreyfuss prepared plans showing no construction and no excavation under the adjacent party walls. Nevertheless, the undisputed facts show that the builder dug by hand numerous pits or holes under the party walls contrary to the plans (J.A. 83, 89, 90, 97, 98, 99, 110, 111, 113, 140, 141, 161).

The buildings were inspected on the day before this over-excavating began and no damage was found (J.A. 82, 83, 85). Damage was found immediately after the excavation was done (J.A. 82,

83, 85). This excavating under the walls caused the damage to the adjacent buildings (J.A. 113, 114).

The builder argues that the plans show a concrete footing supporting the party walls. He argues that he assumed such a footing was present when he began work on the job. He infers in this argument that if such footings had existed then his undermining the walls would not have caused damage. He infers that the assumed footings would have supported the walls satisfactorily.

This argument is shown to be specious in the light of the facts. It is clear that the very moment the first shovel went under the party walls the builder would know that no continuous concrete footings existed (J.A. 138, 142, 143, 149). Nevertheless, after having such knowledge the builder proceeded to dig numerous, large, unauthorized pits under the walls.

Therefore, the excavations were made after the builder had actual knowledge of the subsurface conditions. He could no longer proceed and then successfully argue he proceeded on an assumption.

In addition, the building inspector for the District of Columbia testified that the showing of such subsurface conditions as footings are not taken literally by persons reading the plans (J.A. 98, 99). Two architects and one structural engineer likewise testified that the portrayal of the footing under the party wall should be read as "assumed" (J.A. 151, 152, 160).

Furthermore, even though the builder states there were no footings under the walls the facts show that the walls were actually supported by a continuous masonry footing (J.A. 153, 157, 161, 162).

There is also evidence that the builder, in excavating under the party walls, was attempting to underpin them. Such a procedure was not called for by the plans and would have required

a building permit. No such building permit had ever been applied for or issued (J.A. 84, 88, 90). So the builder was proceeding illegally.

The specifications prepared by the architect and good building practice would have required the builder to contact the architect for advice before proceeding with his work (J.A. 142, 143, 154, 155).

And lastly, the undisputed testimony as to the adequacy of the plans is that the building could and should have been built exactly as originally planned (J.A. 157, 162, 163).

Based on the above facts, it cannot be argued that the trial court's findings of fact or conclusions of law are "clearly erroneous".

Under Rule 52A, Federal Rules of Civil Procedure, findings of fact may not be set aside unless "clearly erroneous". Findings of fact are not "clearly erroneous" unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. Fleming v. Palmer, C.C.A. 1st, 1941, 123 F.2d 749, certiorari denied 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739; Allyn v. Abad, C.C.A. 3d, 1948, 167 F. 2d 901; U. S. v. Still, C.C.A. 4th, 1941, 120 F.2d 876, certiorari denied 62 S.Ct. 135, 314 U.S. 671, 86 L.Ed. 537; Tucker v. Dr. P. Phillips Co., C.C.A. 5th, 1945, 148 F.2d 904; Fox River Paper Corp. v. U. S., C.C.A. 7th, 1948, 165 F. 2d 639; Gipps Brewing Corp. v. Central Mfrs.' Mut. Ins. Co., C.C.A. 7th, 1945, 147 F.2d 6.

The rule that findings of fact of the trial court may not be set aside unless "clearly erroneous" has been applied in cases involving issues of negligence. U. S. v. Schultetus, C.A. 5th, 1960, 277 F. 2d 322, certiorari denied 81 S.Ct. 67, 364 U.S. 828, 5 L.Ed. 2d 56; Simmons v. Gibbs Mfg. Co., C.A. 6th, 1960, 275 F.2d 291;

Bowyer & Johnson, Inc. v. Sanders, C.A. 5th, 1959, 271 F.2d 275; Burpo v. Chesapeake & O. Ry. Co., C.A. 6th, 1959, 266 F.2d 512.

CONCLUSION

Appellee Dreyfuss contends that the findings of facts and conclusions of law of the trial court are fully supported by the evidence and should be upheld. The judgments entered herein should be affirmed.

Respectfully submitted,

CHARLES E. CHANNING, JR.

1625 K Street, N.W.
Washington 6, D.C.

Attorney for Appellee Dreyfuss

CERTIFICATE OF SERVICE

A copy of the foregoing Brief for Appellee was served by hand
this fourteenth day of October, 1963, upon council of record.

Charles E. Channing, Jr.

Attorney for Appellee

BRIEF FOR APPELLEES, PRYCE AND ASH

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,739

No. 17,740

LESMARK, INC.,

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Appellees.

FILED SEP 24 1963

Nathan J. Paulson
CLERK

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF APPELLEES, PRYCE AND ASH,
OF QUESTIONS PRESENTED

The first question is whether the motion of appellees, Pryce and Ash, to dismiss as to them, the appeals of Lesmark, should be granted where it is shown that the Charrons have paid the judgments in favor of Pryce and Ash, thus rendering these appeals moot and where Lesmark's rights will not be thereby jeopardized.

The second question is whether the lower Court was correct in its findings and conclusions holding Lesmark and the Charrons liable to these appellees, where the evidence established that Lesmark negligently dug pits under the adjoining party walls in violation of the plans and of the District Building Code and where, under the holdings of this Court, the liability of the Charrons for the acts of Lesmark attaches as a matter of law,

The third question is whether the awards of the lower Court for the cost of repairs to appellees' damaged buildings and for the further damage to the 1917 Eye Street property for loss of rent and loss of value as permanent damage were correct where the evidence fully supported such awards and the same are allowable under the rulings of this Court.

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BRIEF FOR APPELLEES, PRYCE AND ASH

COUNTERSTATEMENT OF THE CASES

Appellee Pryce owned the building at 1917 Eye Street, N.W., which had been rented to tenants for use as office space since 1946 (J.A. 30, 175). In July, 1959, the Ver Standig Advertising Agency occupied the entire building (J.A. 31), of four stories and basement. There are four rooms and two lavatories on each floor with a long hall connecting them, and a stairway (J.A. 30) and elevator in the center of the building (J.A. 30, 111).

Appellee Ash owned the building at 1921 Eye Street, N.W. (J.A. 66, 175). The premises were used as office space and in July, 1959, the entire building, except one room in the basement, was occupied by Ash and his law firm (J.A. 68, 175). The building, consisting of four floors and basement, has three rooms on each floor, a stair well and a hall that runs along the east side of the building (J.A. 67).

Appellees, Walter S. Charron and Marie L. Charron, husband and wife, owned the property at 1919 Eye Street, N.W., bounded on the east by the Pryce property and on the west by the Ash property (J.A. 21, 22). The west wall of the 1917 Eye Street building and the east wall of the 1921 Eye Street building are party walls (J.A. 89).

On May 19, 1959, Edmund W. Dreyfuss, as the authorized agent for the Charrons, filed an application with the District of Columbia Government for a building permit for the erection of a new building at 1919 Eye Street. The application stipulated that the "owner or his agent in affixing his signature hereto expressly agrees to comply with all specifications and conditions of this application and all Codes and Regulations of the District of Columbia" (Pl. Ex. No. 54). Pursuant thereto, the District of Columbia Government issued Permit No. B 50246 to the Charrons for construction of the building (Pl. Ex. No. 54, J.A. 175).

Appellant, Lesmark, Inc., entered into a contract with Walter S. Charron, dated July 17, 1959, under which Lesmark agreed to furnish all of the materials and perform all of the work for construction of the building at 1919 Eye Street, N.W., in accordance with the approved plans and specifications (Pl. Ex. No. 53, J.A. 175, 176). The drawings and specifications for the building are expressly included as a part of the contract (J.A. 173).

James W. Harris, a Building Inspector with the Department of Licenses and Inspection of the District Government, inspected the site

at 1919 Eye Street on several occasions. The general excavation for this building had been completed during the week prior to July 28, 1959 (J.A. 82, 176). On his inspection of July 27th, the site appeared exactly as it did in the photographs, Plaintiff's Exhibits Nos. 4, 5 and 6, except that none of the holes had been dug under the walls of the adjoining buildings. There was a solid mound of dirt around the buildings at the bottom of the excavation. He observed no cracks in either of the adjacent buildings on his July 27th inspection (J.A. 83, 85).

At about 9:00 A.M. on July 28, 1959, Mr. Harris was called to the building site (J.A. 82, 85). From his observations, the holes underneath the adjacent buildings, as shown on the photographs identified as Plaintiffs' Exhibit Nos. 4, 5 and 6, had been dug sometime between the start of work on July 28th at about 7:30 A.M. and 9:30 A.M. when he arrived at the site (J.A. 85). Mr. Harris asked Lesmark's superintendent on the job why he started to underpin. The superintendent said it was the usual practice and he thought the building should be underpinned (J.A. 84). Mr. Abrams, president of Lesmark, said, we "dug small holes along the wall to see if there were footings there and you could see there were not" (J.A. 144).

William E. Dripps, Superintendent of the Inspection Division of the District Government, inspected the site and the two adjoining buildings on the morning of July 28th (J.A. 89, 90, 92). He said the pits dug under the party walls were not authorized by the plans (J.A. 90). The pits were not at the places where columns were to be installed for the new building and the plans did not indicate that excavations were to be made under the party walls (J.A. 99). The construction was to touch the party walls only at the places where the two columns on each side were to be built and at the front and back walls (J.A. 101).

On the morning of July 28th, Edmund W. Dreyfuss, an appellee, and architect for the building at 1919 Eye Street, was requested by a representative of the District License and Inspection Section to go to

the building site. He arrived there about 9:00 A.M. (J.A. 111, 112), and observed that many holes had been dug under the two party walls. Those pits or excavations were not authorized by the plans. In excavating for the four columns, two at each wall, the plans called for excavation up to the face of the wall but not under it (J.A. 113). In the opinion of Mr. Dreyfuss, the cause of the damage to the buildings at 1917 and 1921 Eye Street was due to over excavation of the party walls, that is, excavation "had been performed in excess of that called for in the plans and in excess of what I consider prudent action" (J.A. 114). Herbert Manuccia, consulting engineer, called as an expert witness by Lesmark, Inc., said the condition was caused by "undermining of the bottom of the wall, due to a subsoil movement" (J.A. 132).

Mr. Dripps observed that the party wall between 1917 and 1919 showed two severe openings $3/4$ " to 1" diagonal cracks in the front portion of the first story. In the second story front portion similar, but less severe, cracks were found. Small cracks like those in the first and second stories were located in the third story (J.A. 89). The cracks were marked with gummed paper labels to determine if movement was still going on and for how long it would continue. Further movement of the walls occurred. The party wall continued to go down and the front wall of 1917 moved upward [outward] toward the street (J.A. 91). The party wall between 1919 and 1921 showed several areas on the first, second and third floors of small $1/14$ to $1/16$ of an inch cracks in the plaster applied to the party wall. No cracks were noticed on the exposed side of this party wall (J.A. 89, 92).

On the site, on the morning of July 28th, Mr. Dripps directed Lesmark to fill the holes under the party walls with concrete as expeditiously as possible and to place bracing across the excavation from party wall to party wall (J.A. 90). Earlier that morning, he had requested the Inspector on the job to order the occupants of 1917 Eye Street to vacate the premises and this was being done when Mr. Dripps arrived at the site (J.A. 91).

In applying the bracing, boards were put against the walls with struts¹ between them (J.A. 149). These struts were forced between the boards with wedges to make sure they were tight. Mr. Abrams testified that this action could cause additional vibration of the walls of both buildings (J.A. 150, 164, 166). Appellees, Pryce and Ash, testified that as the bracing was taken down, additional cracks appeared in the walls of both buildings and more plaster fell (J.A. 165, 166, 177).

On July 29, 1959, the District of Columbia Government, by letter to the contractor and to Walter Charron, ordered them (1) to temporarily shore and make safe the buildings at 1917 and 1921 Eye Street; (2) to submit plans and procedures, and obtain approval of the same, for permanently restoring the two buildings; (3) to proceed to restore the buildings in accordance with the plans and procedures approved in (2) above; and (4), to submit revised plans for the proposed building at 1919 Eye Street, N. W. (J.A. 60, Pl. Ex. No. 20).

Under date of August 28, 1959, a second letter was directed to the same parties by the District of Columbia Government, stating that the front wall of 1917 Eye Street had not been satisfactorily secured to the west wall of that building to insure the stability of the front wall and advising again, as to submission of the plans and procedures for permanently restoring the two buildings (J.A. 60, Pl. Ex. No. 21).

The contractor and owners of 1919 Eye Street took no action in response to the two letters sent to them by the District Government (J.A. 33). As a result Mrs. Pryce filed suit and sought an injunction to stop construction on 1919 Eye Street until her building had been put in a safe condition (J.A. 33). On September 9, 1959, the District Court granted a temporary restraining order enjoining the contractor, architect and owners from proceeding with construction on 1919 Eye Street until the building at 1917 Eye Street was made structurally safe. This order was continued in effect by the Court, with the consent of the parties, for an extended period of time while Lesmark completed the

structural repairs to the building at 1917 Eye Street (J.A. 34, 178). Lesmark thereafter took down the old plaster and replastered and painted two rooms on each floor in the front part of the building and basement at 1917 Eye Street (J.A. 34, 35, 131, 147).

Mrs. Pryce requested Mr. Abrams to restore the rear part of her building to the condition it was in prior to the accident and to paint the front but he did not do so (J.A. 65, 66, 164). Mr. Abrams, on direct examination, testified that he repaired all of the damage that was agreed upon between Lesmark, the District of Columbia and Mrs. Pryce (J.A. 146, 147), but on cross examination, he said his engineer, Mr. Manuccia, and Mr. Locraft, appellees' engineer, had agreed only as to structural repairs (J.A. 150).

The repairs to the building at 1917 Eye Street by Lesmark were done between the early part of October and December 15th (J.A. 35). At that time Mrs. Pryce began to get bids from contractors for the flooring and redecorating. As to other firms with which she contracted, the people had worked on the building for many years and knew it well (J.A. 35, 38). She had these firms complete putting her building back into a tenantable condition (J.A. 35).

The Adams Renovating Company did the redecorating of the 1917 Eye Street building. It included the painting of rooms, other than those done by Lesmark, the lavatories, halls and woodwork, the repair and painting of the stairway and some plaster repair (J.A. 39, 40). On the exterior, the work done by Adams included painting the brick, wood and metal work on the front of the building, the exterior woodwork and metal at the rear and on one side of the building and painting the fire escape (J.A. 41). This was necessary because of the damage to the walls and damage caused by Lesmark's workmen in removing debris and from dirt and dust which had accumulated in the building. Debris was both thrown and carried down the stairway. Other debris was thrown out on the fire escape and out the rear windows (J.A. 39, 40, 41).

The exterior painting was necessary because the star bolts and channel iron placed on the front of the building by Lesmark had defaced it. The metal at the side and back of the building and the fire escape were damaged by debris (J.A. 40, 41, 163, 164). Most of the windows were out of plumb. Some were weather stripped and the weather stripping had to be taken out and replaced. All of the windows had to be caulked and many of the sash cords were broken due to the accident. Likewise, the front door did not fit (J.A. 42). Of the total item of \$754.00 listed on the Adams' bill for the repair of windows and the door, Mrs. Pryce claimed \$452.00 was directly caused by the accident. She did not claim the cost of repairing windows in the rear of the building. The \$452.00 was arrived at by taking 23/38 of \$754.00, there being 23 windows in the front part of the building that were damaged and 38 windows in the entire building (J.A. 42). Other items of damage included the cost of rehanging several doors that were out of plumb and the necessary hardware for them (J.A. 43). The interior of the elevator was repainted as were some doors and shoe molding (J.A. 42). The total bill of Adams Renovating Company, Plaintiffs' Exhibit No. 29, was \$3,022.00. After excluding items that were not due to the accident, totaling \$553.00 (J.A. 43), the amount claimed, resulting from the accident, was \$2,469.00 (J.A. 43), which sum was allowed by the Court (J.A. 169, 180).

Mr. Gehley of Gott's Linoleum, Incorporated, testified as to work done by that firm. One part of the contract called for installation of asphalt tile in certain rooms that previously had linoleum on the floors and for masonite underlay in two hallways. The charge for this work was \$510.00. Another part of the work was cleaning and waxing of floors in two rooms and installing some cedar wood molding at a cost of \$38 75 (J.A. 104, 105). Mrs. Pryce testified that this work was necessary because of the debris and the activity of the workmen in the building (J.A. 44). The Court allowed \$348.75 of Gott's bill, discounting the claim by \$200.00 because of enhancement due to installing asphalt tile as linoleum replacement on the floors (J.A. 169, 170).

Other work done by Gott's in the sum of \$535.00 for installing treads and risers on the stairs and asphalt tile on the landings (J.A. 105) was not caused by the accident and not included in appellee's claim (J.A. 44, 65).

The heavy Yale door closer on the front door would not work because the door had been knocked out of plumb as a result of the accident. It was replaced with a new one by Wizard Locksmith Company, Plaintiffs' Exhibit No. 34, at a cost of \$29.78, after allowance for trade in of the old one (J.A. 44). The Court allowed this sum as an item of damage (J.A. 170).

Appellee Pryce paid the bills of Bernard Locraft, civil engineer, in the sum of \$292.75, Plaintiffs' Exhibit No. 37. Mr. Locraft advised her on how best to protect her building and to be sure that it was made safe again for occupancy. Mr. Locraft's bills cover various inspections at the site and inspections and interviews at the District Building (J.A. 33, 45). The Court allowed this sum as damage (J.A. 170).

The bill of Electrical Associates, Plaintiffs' Exhibit No. 26, covered removal of the air conditioners and lighting fixtures. Later the fixtures were rehung and the air conditioners were put back in the windows as they were originally. The electrical wiring was checked throughout the entire building and fluorescent starters, lamps and three fixtures were installed. The bill rendered for these services in the sum of \$420.89 was fair and reasonable in the opinion of Robert Allen Harris of the Electrical Associates firm (J.A. 129, 130). Mrs. Pryce testified that the work was necessary because of the accident (J.A. 38, 59, 60). The Court allowed this bill as damage (J.A. 170).

The Whiting Elevator Company installed the elevator in the building at 1917 Eye Street and had a service contract calling for monthly inspections, checking, etc. The last inspection prior to the accident was about the middle of July. At that time the elevator was satisfactory

(J.A. 108, 109). After the accident the District shut down the elevator (J.A. 108), condemned the cables (J.A. 109), and notified Mrs. Pryce by letter that certain repairs had to be made before the elevator would be certified for use (J.A. 36). Mr. Berry of the Whiting Company testified that new cables were installed. The cables and light circuits seemed to have been effected by the accident and it was necessary to clean all the way through because there was dust from top to bottom. In the opinion of Mr. Berry, the entire bill of Whiting, Plaintiffs' Exhibit No. 24, in the sum of \$390.000 was attributable to the accident (J.A. 109-111). The Court allowed this sum as damage (J.A. 169).

Mrs. Pryce testified that she paid \$149.00, in the period from September 9, 1959 to April 26, 1960, represented by her checks constituting Plaintiffs' Exhibit No. 39, in payment for the removal of debris from her building (J.A. 46). The Court allowed this as damage (J.A. 170). The Court disallowed the claim of \$31.65, bill of John Ligon, Plaintiffs' Exhibit No. 35, since it covered the retaping of venetian blinds and was not a repair item (J.A. 179). The total allowed by the Court to appellee, Pryce, for repairs, was rounded to the sum of \$4,100.00 (J.A. 170).

On July 31, 1959, M. Belmont Ver Standig, Inc., tenant in the building at 1917 Eye Street, notified Mrs. Pryce that it would vacate the premises on or before August 31, 1959, and that it would not pay rent for the month of August because the premises were untenable (Pl. Ex. No. 22, J.A. 178). The building was not thereafter rented up to the time it was sold on December 15, 1960 (J.A. 47, 51). In her efforts to find a tenant, beginning in late August, 1959, she checked in every way she could with people she thought might be in need of space but was unsuccessful in her efforts (J.A. 46). On December 7, which was before Mr. Abrams' men had finished the work, she listed the property for rental with Thomas J. Fisher & Company and Mr. Knox and Mr. Marshall of that firm made great efforts to rent it (J.A. 46, 47). On

May 11, 1960, she listed the property for both sale and rent with Fisher & Company. The latter posted a sign on the building and advertised by means of newspapers and contacting people by mail in efforts to rent or sell the building (J.A. 51). In July, she listed the property for sale or rent with several other real estate firms (J.A. 46, 47, 63).

Mrs. Pryce's original listing for rental of the property was \$815.00 per month (J.A. 52). Several prospects made offers for partial occupancy but her real estate agent told her they were not acceptable because of their credit ratings and none met the listed rental figure (J.A. 52, 63). No acceptable tenants made offers, even at a price below that at which the property was offered (J.A. 52).

Mrs. Pryce calculated her rent loss for the period of vacancy from August 1, 1959, through December, 1960, as follows:

Gross rental, 17 months, \$805 per month	\$ 13,865.00
Less: Adjustment for services normally supplied such as heat, light, char, etc., based on the average monthly cost for the years 1957 and 1958 of \$345.00	5,865.00
	<u>\$ 8,000.00</u>
Add: The cost of heat, light and maintenance during the period when repairs were being made and during the showing of the property for rent or sale	1,800.00
	<u>\$ 9,800.00</u>

The adjustment for services supplied to the tenant and for heat, light and maintenance during the period after the accident is based on detailed figures taken from Mrs. Pryce's books of original entry (J.A. 47-50). The Court awarded the sum of \$9,800.00 for loss of rent (J.A. 179).

Permanent damages occurred to the building at 1917 Eye Street that were not repairable. The floors were damaged and out of level, and when Mrs. Pryce consulted someone as to the possibility of leveling the floors in the front part of the building, she was advised that the

cost would be exorbitant (J.A. 50, 51, 179). There were cracks in the stone facing on the front of the building as shown in Plaintiffs' Exhibit No. 1 (J.A. 31, 32, 87, 179). Star bolts and a channel iron placed on the front to make it structurally safe had defaced it (J.A. 40, 41), though this was made as appealing as possible by painting the front and covering the channel iron with a down spout (J.A. 40, 41, 163). Further elements of permanent damage were the bad name the building acquired from newspaper articles and pictures, because of the barricades erected in front of the property (J.A. 51), and because of the extended period of time the building was vacant (J.A. 125, 126, 179).

Mr. J. A. Weinberg, Jr., realtor and appraiser, whose qualifications were conceded (J.A. 122), testified as to the value of the 1917 Eye Street property. He was very familiar with property in that area. His firm sold Mrs. Pryce's building in December, 1960, for \$67,500.00. Based upon the figures furnished to him, the property had a value of \$80,000.00 before the accident in 1959 (J.A. 123, 126). This difference of \$12,500 represents the loss in value (J.A. 122, 123).

Mr. Weinberg arrived at the value of \$80,000.00 by capitalizing the income as of the time of the accident by taking 100 times the monthly rent of \$805.00 (J.A. 123). Depending on the circumstances, the factor used could go as low as 60 or 65 and as high as 150 or 155, times the monthly rental. The emphasis in this case was upon the amount of income and the continuity of income. There was a safety factor in the continuity of income even though the property was rented on a month to month tenancy because the value was there (J.A. 124). The ten year history of the gross income proved the reasonableness of the \$805.00 monthly rental (J.A. 126). These rentals, plus his general knowledge of that particular area, the zoning, the remodeled houses in the area, this one having an elevator, and the reasonable assurance of rent continuity were all considered in using the factor of 100 (J.A. 123, 124, 126, 127).

The reason the property was vacant so long is a great intangible. Mr. Weinberg said property gets a good name or a bad name and a fire or casualty to any property will cause people generally to be a little suspicious of it and shy off. It is not unusual for property to get a bad reputation and it will take quite a while to overcome it (J.A. 125, 126). People have a little hesitancy in knowing whether it is actually 100 per cent cured or not (J.A. 127).

Mr. Weinberg's firm also participated in the resale of the property at \$75,000.00. When Mrs. Pryce sold the building it was vacant but on the resale, partial tenancy of the building had been obtained. These factors eliminated some of the fear and strengthened Mr. Weinberg's opinion as to the value for the building of \$80,000.00 before the accident (J.A. 127, 128).

The value of Mrs. Pryce's building when she inherited it in 1946 was \$35,014.00. She made capital improvements at that time of about \$28,000.00, including elevator, complete wiring and plumbing, flooring and decorating. After these improvements were completed the total value of the land and building for income tax purposes was \$72,062.00, and the value of the building was \$60,723.00. In 1948, 1949 and 1953, additional capital improvements were made including a new boiler, a new roof and installing copper on the mansard part of the roof making a total value for the building in 1953 of \$67,062.00, which is exclusive of the value of the land (J.A. 64). Following the accident in 1959, Mrs. Pryce installed a gas furnace at a cost of \$1,080.00 and purchased the air conditioning units from the Ver Standig Agency for \$700.00 (J.A. 65).

The Court allowed as permanent damages the sum of \$7,500.00 (J.A. 179), stating that this amount represents the difference between the price at which Mrs. Pryce sold her building and the sale thereafter for \$75,000.00, believing that the best test of the market value at or about the time of the sale was the price at which the property sold after the accident and after elimination of the so-called bad reputation and other elements of damage (J.A. 170).

The total amount awarded by the Court to Mrs. Pryce was the sum of \$21,400.00 (J.A. 170).

Mr. Ash testified that he purchased the property at 1921 Eye Street in 1954 and spent a substantial sum in putting it in as good a condition as possible. The building was in excellent condition just prior to the accident (J.A. 66, 68). As to damage that occurred, in the rear there was a crack that ran all the way from the basement to the roof, that one could see through. There were two other rather extensive cracks running the height of the building and numerous lateral cracks in all of the rooms of the building (J.A. 66, 67). All of the walls were in bad condition and quite a few of the doors wouldn't close (J.A. 67). In the lavatory on the third floor, which was finished in ceramic tile, a great deal of the tile had come off on the walls and floor (J.A. 67).

The bill of Hamilton Decorating Company, Plaintiffs' Exhibit No. 42, was in the sum of \$2,108.75, which Mr. Ash paid. All items on the bill were due to damage except for a few minor ones which he enumerated (J.A. 68, 69). One of the big items of damage was the loosening of plaster. The ceiling plaster kept falling off and Mr. Ash was advised that it would be cheaper to install acoustical tile, rather than to re-plaster. As a consequence, acoustical tile was installed on the ceilings in the three rooms and hall on the first floor, and in the three rooms on the second and third floors (J.A. 69). The A. W. Lee firm installed the tile for \$1,170.00 and made some plaster repairs. Also, a second bill of A. W. Lee, Inc. of \$175.13 for additional plastering done at the request of Hamilton Decorating Company was paid by Mr. Ash (J.A. 69, 70). Both bills represent repairs to the building resulting from the accident (J.A. 70).

Mr. Ash paid the bill of J. W. Conway, Inc., of \$816.36 for repairs and re-roofing of the upper main roof and repairing damaged wall of \$67.21 (J.A. 71). George R. Watson of the Conway firm testified that

the item of \$67.21 for work done on the east wall of 1921 Eye Street was in repair of damage (J.A. 101).

Mr. Ash paid \$496.24 to James J. Madden, a plumber, for work done on his building, including repair of a leak in a water pipe and paid to Standard Floors, Inc., \$215.40 for installation of tile in two baths on the first and third floors, and for sub-floor preparation (J.A. 72). He paid Davis, Wick, Rosengarten & Co., the sum of \$58.01 for cutting holes in the ceiling to inspect the structural members and to repair a leak in the walls (J.A. 72, 73). The sum of \$37.00 was paid to Smither & Company, Inc., for a survey of damage, to replace bad brick and to point up brick in the basement of the building. Except for the charge for the survey by Smither & Company, all of these items represent repair of damage (J.A. 72, 73).

Bernard F. Locraft, engineer, rendered services as a result of the accident, including submission of reports on the condition of 1921 Eye Street and on the shoring at the building. The bills totaled \$270.25, which sum was paid by Mr. Ash. The reason for Mr. Locraft's employment was that the building continued to settle. Mr. Ash was concerned as to its safety and he wanted Mr. Locraft to check and advise him on it (J.A. 74). Another bill, that of Frances Luna Ash, Inc., in the sum of \$47.07, was for wallpaper used to paper the first floor hall after the accident (J.A. 74, 75).

Mr. Mahara, of the Hamilton Decorating Company, testified as to damage and repairs to the building (J.A. 119). The first item on the Hamilton bill, Plaintiffs' Exhibit No. 42, was for removal of plaster and tile from two bathrooms, which was loose. Mr. Mahara thought it would be cheaper to use Marlite tile rather than to replaster and put in new ceramic tile (J.A. 119). Mr. Mahara said the ceilings were in terrible shape and the cost of replacing them would have been very expensive (J.A. 120, 121), so he got bids to install acoustical tile. The contract was awarded to A. W. Lee, Inc., who did this job and also

plastered in several places in all rooms facing the east wall up to the fourth floor. All of this work was in repair of damage (J.A. 121, 122). Hamilton Decorating did the painting and pointing up and some plastering, which were necessary repairs (J.A. 120).

Mr. Mahara also testified concerning work done by Standard Floors, Inc. in installing tile in lavatories. This work, in repair of damages, was necessary because the floors were cracked and the old tile was coming loose (J.A. 121).

Lesmark, Inc. made no repairs to the Ash property (J.A. 178). Mr. Abrams testified that he did not do anything to the interior of the building at 1921 Eye Street because he "didn't notice anything" (J.A. 146).

The Court awarded damages to Mr. Ash for repairs to his building as a result of the accident, as follows:

A. W. Lee, Inc.	\$ 1,170.00
A. W. Lee, Inc.	175.13
J. W. Conway, Inc.	67.21
Hamilton Decorating Co.	1,515.75
Frances Luna Ash, Inc.	47.07
Bernard F. Locraft	270.25
Smither & Company	37.00
Davis, Wick, Rosengarten, Inc.	58.00, and

the sum of \$131.59 on the claims of James J. Madden and Standard Floors, Inc. The total amount of the award to appellee Ash was \$3,472.00 (J.A. 170, 171).

The Court filed findings of fact and conclusions of law (J.A. 174-181). One of the conclusions was that the liability of the Charrons to appellees, Pryce and Ash, was established by law by reason of their being the owners of 1919 Eye Street, N.W. (J.A. 181).

Judgments were entered on November 21, 1962, in favor of appellees, Pryce and Ash, in the respective sums of \$21,400.00 and \$3,472.00. Both judgments were against "Walter S. Charron, Marie L. Charron and Lesmark, Inc." (J.A. 182).

Only Lesmark, Inc., appealed. Its appeal is from the judgments entered against it and in favor of Isabel C. Pryce, Walter S. Charron, Marie L. Charron, Robert Ash and Edmund W. Dreyfuss (J.A.186).

On May 22, 1963, appellees, Walter S. Charron and Marie L. Charron, paid and satisfied in full, the judgments entered in favor of Isabel C. Pryce and Robert Ash. Praecipes to this effect were filed in the Court below on May 24, 1963. On June 4, 1963, appellees, Pryce and Ash, filed in this Court a Motion to Dismiss the appeals of Lesmark, Inc., as to them. Opposition to said Motion was filed herein by Lesmark, Inc. The Motion of appellees, Pryce and Ash, was ordered held in abeyance pending hearing on the merits, by Order of this Court, dated July 12, 1963.

REGULATIONS INVOLVED

Applicable provisions of the 1951 Building Code of the District of Columbia, of which the Court took judicial notice (Trans. of Proceedings, pages 565, 566), are as follows:

Section 201-03 n. Alternation (sic) of drawings. — It shall be unlawful to deviate in any manner from, or to erase, alter, or modify any lines or figures contained upon drawings after being stamped by the Director of Inspection or filed with him for reference; except that if, during the progress of the execution of such work, it is desired to deviate in any manner affecting the construction or other essentials of the building from the terms of the application or drawing, notice of such intention to alter or deviate shall be given in writing to the Director of Inspection, and his written assent shall be obtained before such alteration or deviation may be made.

Section 307-02. — Protection of excavations. All excavations shall be protected by sheet piling or adequate shores, if necessary, by the persons causing the same to be made, so that the sides shall not cave in and so that adjoining buildings and property shall not be damaged; all excavations shall be kept free from water and the building owner shall provide safe barricades.

SUMMARY OF ARGUMENT

The judgments entered in favor of appellees, Pryce and Ash, were paid by the Charrons. Thereupon said appellees filed a motion in this Court to dismiss the appeals of Lesmark as to them, on the ground that payment has rendered the issue moot. It is submitted that Lesmark's rights will not be jeopardized by dismissal of these appeals, because the judgment over, in favor of the Charrons and against Lesmark, for the amounts paid by the Charrons to Pryce and Ash, has been appealed from and can be implemented by the lower Court pursuant to the judgments to be entered by this Court on disposition of the other appeals of Lesmark herein. As nothing further is required of Pryce and Ash, with reference to these appeals, it is submitted that their motion to dismiss should be granted.

On the issue of liability, the impartial evidence of the District Building Inspectors established that Lesmark violated the plans for the new building in digging pits under the adjoining party walls. The violation of the plans constituted a breach of Section 201-03 n of the District Building Code. Other evidence, not contradicted, proved that the digging of the pits by Lesmark was the proximate cause of the damage. The sequence of events on the morning of July 28th, when the pits were dug, thereby causing an almost immediate movement of the walls of appellees' buildings coincided with the testimony that this over excavation was the cause of the damage.

It is submitted that Lesmark's negligence rendered it liable to Pryce and Ash, for the damage proximately resulting to their buildings. Liability may also be fastened on Lesmark under the holdings of this Court because of its violation of Section 201-03 n of the Building Code. Where legislation prescribes a standard of conduct for the purpose of protecting life, limb or property from a certain type of risk, the breach of that duty, this Court has said, is at least evidence of negligence. Accordingly, the lower Court would have been justified in concluding,

on the basis of this violation, independently of the other act of negligence, that Lesmark was negligent and liable.

The Charrons, as owners of the property at 1919 Eye Street, took no part in the physical construction of the new building. However, the work to be performed was of such a nature that responsibility for it could not be delegated to the contractor. This Court has held, in such circumstances, that the liability of the owner is determined as though he actually made the excavation himself. The Charrons are likewise made liable as a matter of law for Lesmark's negligent acts, which were in violation of the District Building Code, because they had agreed, in applying for the building permit, to comply with all Codes and Regulations.

The lower Court awarded damages to both appellees for the cost of repairs, with additional sums to appellee, Pryce, for loss of rent and permanent damages to her building.

The award for permanent damages was justified by reason of the loss in value to her property from the defacing of the front of the building, the racking of the floors, the bad reputation acquired as a result of the accident and the fact that the building was vacant for an extended period. As held in several of the cited cases, where damage is partly repairable and partly permanent, awards can properly be made for cost of repairs and for permanent damage. In arriving at the amount to be awarded for this loss, the Court allowed \$7,500.00, representing the difference between the sale by Mrs. Pryce at \$67,500.00 and the price on resale of \$75,000.00. The Court observed that the resale had eliminated some of the factors tending to depress the value of the building and said the best test of the market value was based on the difference between the price on the initial sale and on resale.

The Court awarded damages for loss of rent for the period from the occurrence of the accident through December, 1960, when the

building was sold. Mrs. Pryce made diligent efforts to locate tenants and later on, to find either tenants or a buyer for the building. The loss covered the rental of \$805.00 per month, less the average cost for char and utility services furnished to the tenant, plus the actual expenses for heat, light, etc. during the period when the repairs were being made and the building was being shown for rent or sale. The decisions of this Court in the Cooper and Karr cases, cited in appellees' argument, hold that damages for loss of rent are recoverable up to the time of trial.

The lower Court awarded to appellees, Pryce and Ash, the respective sums of \$4,100.00 and \$3,472.00 for cost of repairs. Both buildings were in a good tenantable condition prior to the accident. The evidence established the need for the repairs, the cost thereof and that payment for the repairs had been made. It is submitted, based on the testimony, that the repairs allowed by the Court restored the buildings to as good a condition as they were just prior to the accident but did not include enhancement beyond that as Lesmark contends. The testimony as to the repairs made and the cost thereof was not challenged or contradicted by any party to the litigation.

Appellees, Pryce and Ash, contend that the findings and conclusions of the lower Court, being amply supported by the evidence, were correct and should be upheld.

ARGUMENT

1. The pending motion of appellees, Pryce and Ash, to dismiss the appeals from the judgments entered in their favor should be granted because payment of these judgments has rendered the appeals moot and the rights of Lesmark will not be thereby jeopardized.

The judgments entered in favor of appellees, Pryce and Ash, were paid and satisfied by the Charrons. As a result nothing further should be required of the appellees concerning the appeals. Their motion, held

in abeyance pending hearing on the merits, pursuant to Order of this Court, seeks dismissal on the ground that payment of the judgments has rendered the issue moot. In support thereof, appellees cited in their motion the cases of Stewart v. Southern Railway Company, 315 U.S. 784, 62 S. C. 801, 86 L. Ed. 1190, Bucks Stove & Range Company v. American Federation of Labor, et al., 219 U.S. 581, 31 S. C. 472, 55 L. Ed. 345, International Bank v. Securities Corporation of District of Columbia, 59 App. D.C. 72, 32 F.2d 968, and Mueller Brass Co. v. Alexander Milburn Co., 80 U.S. App. D.C. 274, 152 F.2d 142.

Lesmark's opposition to the motion of appellees, Pryce and Ash, was predicated principally on the ground that dismissal of these appeals might jeopardize Lesmark's rights if this Court should reverse the judgments against Lesmark in favor of the other appellees herein. It is submitted that appellants' conclusion is erroneous.

The judgment apparently giving concern to Lesmark and referred to in its opposition is contained in the lower Court's order of November 21, 1962. It provides for judgment in favor of the Charrons and against Lesmark for the full amount of the liability incurred by the Charrons because of the judgments against them in favor of appellees, Pryce and Ash. It may be noted, however, that the judgment in favor of the Charrons is not for a liquidated sum. Consequently, it will require implementation by the lower Court at the appropriate time to fix the amount thereof. Moreover, this judgment is open and subject to the decision of this Court, since it is among the judgments appealed from by Lesmark (J.A. 186).

Accordingly, after the judgments of this Court have been entered, the lower Court can implement the existing judgment in favor of the Charrons and against Lesmark as thus directed. Assuming, arguendo, that the judgments herein are affirmed, such implementation will still be necessary in order that the final judgment will specify a liquidated sum in favor of the Charrons.

It would appear, also, that Rule 60(b), subsections (5) and (6), of the Federal Rules of Civil Procedure is applicable here. Consequently, if the necessity arose, the lower Court would have the power to grant relief to Lesmark in conformance with the judgments rendered by this Court on these appeals.

Since it is apparent that Lesmark's rights will not be prejudiced thereby, appellees, Pryce and Ash, contend that the appeals of Lesmark as to the judgments entered in their favor should be dismissed.

2. The lower Court's holding that Lesmark and the Charrons were liable to appellees, Pryce and Ash, was proper where the impartial evidence established that Lesmark negligently dug pits under the adjoining party walls in violation of the plans and of the District Building Code which excavations proximately caused the damage to appellees' buildings with liability of the Charrons for the acts of Lesmark attaching as a matter of law.

I - Liability of Lesmark

The uncontradicted evidence points unmistakably to Lesmark's negligence in digging pits under the party walls, thereby causing the damage to appellees' buildings. The impartial testimony of Messrs. Dripps and Harris, District employees, made it clear that the plans did not call for pits to be dug under the walls. Thus, the excavations were in violation of the plans and Section 201-03 n of the District Building Code.

The activity of Lesmark's workmen at the building site on the morning of July 28, rather vividly highlighted the cause of the damage. It may be noted that the inspection by Mr. Harris on the preceding day revealed no cracks in the adjoining buildings and no holes dug under the party walls. On the morning of July 28th, Lesmark dug the pits. Almost at once cracks began to appear from movement of the walls and Inspectors were called to the scene. Consistent with the physical facts. Mr. Dreyfuss said the damage was caused by this over excavation.

On the issues of negligence and cause of damage no evidence was offered controverting the testimony introduced on behalf of appellees, Pryce and Ash. The only challenge, that of Lesmark, was a tangential one, contending there were no footings under the party walls. It is submitted that the existence or non-existence of footings had no causal relationship to the resulting damage. It may be noted that the walls were intact from the time the general excavation was completed during the previous week, and remained in such condition until the pits were dug on the morning of July 28th. This fact, in addition to refuting appellant's contention, further emphasizes that the cause of the damage resulted from digging the pits.

Appellees accordingly contend that the findings of the lower Court charging Lesmark with negligence and establishing such negligence to be the cause of the damage were warranted by the overwhelming weight of the evidence. The lower Court's conclusion that Lesmark was liable for the damage follows naturally from these findings and comports with the decision of this Court in the early case of Cooper v. Sillers, 30 App. D.C. 567, holding that one who negligently uses a party wall is liable for all damages directly resulting therefrom.

Appellees submit that Lesmark is also chargeable with liability because of its violation of the Building Code. The excavations under the party walls, being a departure from the plans, constituted a violation of Section 201-03 n of the District Building Code in that deviations from the plans are unlawful, where, as here, no advance approval for the same was obtained from the Director of Inspections. In such circumstances this Court has held that where legislation prescribes a standard of conduct for the purpose of protecting life, limb or property from a certain type of risk, the breach of that duty is at least evidence of negligence. Whetzel v. Jess Fisher Management Co., 108 U.S. App. D.C. 385, 388, 392, 282 F.2d 943, and cases cited therein. In the instant case, it is clear that Lesmark's violation of the plans breached the

provisions of Section 201-03 n. Accordingly, the lower Court would have been justified in concluding, on the basis of this violation, independently of the other act of negligence, that Lesmark was negligent and liable for the ensuing damages.

II - Liability of the Charrons

The liability of the Charrons takes a different tack in that they had no part in the physical construction of the new building. It is clear, however, that as owners of the property at 1919 Eye Street, they applied through their architect for a building permit. This application stipulated, in part, that the owner expressly agrees to comply with all Codes and Regulations.

Liability here, as with Lesmark, is two pronged. Under the one prong, appellees contend the Charrons cannot escape liability for the negligent performance of the work by delegating it to an independent contractor. The other prong of liability arises out of the breach by the owners of the provisions of the District Building Code.

On the question of the non-delegable duty imposed upon the owner, a good exposition of the rule is given in the annotation set forth in 33 A.L.R. 2d 7, 47, as follows:

"* * * [O]ne who orders work to be executed, from which, in the natural course of things, injurious consequences must be expected unless means are adopted to prevent them, is bound to see that necessary steps are taken to prevent the mischief, and such person cannot relieve himself of his responsibility by employing someone else to do what is necessary to prevent the work from becoming wrongful. This rule is sufficiently comprehensive to embrace not only work which is inherently or intrinsically dangerous, but also work which will, in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted."

The case of Law v. Phillips, 136 W. Va. 761, 68 S.E. 2d 452, 459, dealing with liability for damages occurring during the course of excavating for a new building, is somewhat similar to the instant case. The Court reviewed the general rule, that the owner is generally absolved from liability for the acts of his independent contractor, and the exception thereto, under which the owner cannot be relieved from such liability, its views as to the latter being expressed in terms similar to those in the annotation quoted above. The Court then went on to state, on the issue of non delegable duty —

"When the injury is a direct result of the work contracted for, it is generally held that if the owner of a lot employs a contractor to make an excavation on it which removes the lateral support of a building of an adjoining owner the doctrine of respondeat superior is applicable, and the liability of the owner of the lot is to be determined as though he actually made the excavation himself."

In the same tenor is the holding of this Court in District of Columbia v. Blackman, 32 App. D.C. 32. In determining whether the owner of the property was liable, it was observed that the hole was dug at the instigation of the owners and for their benefit, and the owners knew, or should have known, that unless it was properly protected serious consequences might arise. In summarizing on the issue of the liability of the owners for the acts of the contractor, this Court stated, at pages 37 and 38, as follows:

"* * * The owner of a lot for whose benefit work like this is performed must take proper precaution to prevent the creation of a nuisance. He cannot escape liability for the natural and direct results that flow from digging a hole in a city sidewalk by hiding behind his contractor."

The later case of Philadelphia, B. & W. R. Co. v. Karr, 38 App. D.C. 193, reaffirms this principle of law, holding both the owner and contractor liable for damages resulting from the contractor's negligent excavations.

Coming to the second prong of the liability of the Charrons as owners of 1919 Eye Street, it has been pointed out previously that the Charrons agreed, in applying for the building permit, to comply with all Codes and Regulations. The circumstances of the instant case, in such respect, closely parallel those of the Blackman case, *supra*. In that case, it was stated, at page 38, as follows:

"* * * The permit, the terms of which the Bogleys (owners) in their application agreed to acquaint themselves with, required that the trench 'be suitably guarded during the day.' It was not guarded or protected, and we see no escape from the conclusion that the Bogleys were as much responsible for the ensuing consequences as Lockheed, who merely did the digging."

We make reference again to the annotation at 33 A.L.R. 2d 7, which, in Section 10 thereof, appearing at page 27, elaborates upon the duty imposed upon the owner by statute or ordinance.

In view of the foregoing, it is submitted that the Charrons as owners of the lot at 1919 Eye Street are equally responsible with Lesmark for the damage to the adjoining properties. Therefore, the Court below properly concluded as a matter of law that the Charrons were liable to appellees, Pryce and Ash.

3. Where the evidence established the reasonable cost of repairs made to appellees' damaged buildings, and as to the 1917 Eye Street property, the loss of rent due to the untenable condition and the inability of the owner after diligent effort to obtain a tenant, and the loss of value of the building due to non-repairable permanent damage, the awards made to appellees by the lower Court, predicated upon such evidence and allowable under the decisions of this Court, should be upheld.

In Cooper v. Sillers, *supra*, this Court ruled that a person who has been negligent in the use of a party wall incident to the construction of a new building is liable for the damages that proximately resulted from the injuries inflicted, with such damages being assessable up to

the date of the verdict. The award was for repair of damage to the party wall, and to doors, windows, ceilings and other parts of the house. It is indicated from the Court's review of the instructions that the owners had abandoned a claim for depreciation in the value of their building as a place of residence.

In Philadelphia, B. & W. R. Co. v. Karr, supra, recovery was sought by the owner of several dwelling houses for damages resulting from the construction of a tunnel under a public street. The damage to one of the houses was so great that it had to be taken down. Estimates as to the cost of rebuilding this house were received in evidence as was testimony showing the depreciation of rental value from the time the injuries were sustained up to the time of the trial. Other damages were claimed, as set forth in the declaration. The walls settled and cracked, the floors sank and became out of plumb, doors and windows were distorted out of square, the rental value of the houses was reduced and the rents thereof were lost. It appears from the Court's opinion that recovery was allowed for all of these elements of damage.

The Cooper and Karr decisions do not separate into categories the items of damage that may be allowed in a given case. Nevertheless, it is evident that the damages awarded to appellees, Pryce and Ash, by the lower Court were well within the scope of the holdings of the Cooper and Karr cases.

The more recent case of Art Club of Philadelphia v. Heyman & Goodman, 325 Pa. 587, 190 A. 922, 924, reviews in considerable detail the damages recoverable due to injury to a building resulting from the construction of a tunnel. The trial Court allowed to the Club among other items, \$4,515.00 for cost of repairs and the sum of \$2,500.00 for depreciation in the building as a result of the damage. No claim was made for loss of rent. The defendant here contended that recovery should have been limited to the cost of repairing the building. In affirming the lower Court's holding, it was stated:

"* * * The plaintiff was entitled to be restored, as nearly as possible, to the position it held before. This Court has settled the principle that for damage to realty a plaintiff may recover for remediable injury the cost of repairing it, or depreciation caused by it, whichever be lower, and for permanent damage, the depreciation in market value of the realty. Citing *Rabe v. Shoenberger Coal Company*, 213 Pa. 252, 62 A. 854, 3 L.R.A. (N.S.) 728, 5 Ann. Cas. 216. The principle of this case is no less applicable where the injury is partly repairable and partly permanent. Such indeed was the *Rabe* case and in *Vanderslice v. Philadelphia*, 103 Pa. 102, very like the instant case, the factors to be compensated were listed as 'permanent injury done to the buildings, cost of repairs and the loss of rent for the time necessary to make repairs'."

Similarly, in *Bator v. Ford Motor Company*, 269 Mich. 648, 257 N.W. 906, 909, these three items of damage were reviewed. However, sums were awarded for cost of repairs and diminished value of the building only, it being pointed out that no rent would be lost during the making of repairs. Further, in *Gerst v. City of St. Louis*, 185 Mo. 191, 84 S.W. 34, damages were awarded for the cost of repairs, deterioration of the building and loss of rent. Included as part of the damage in the *Gerst* case was the loss in the salable value of the building because the property would be prejudiced in the estimation of possible buyers on account of having been injured and repaired.

Within the framework of these cases, it is submitted, as herein-after set forth, that the allowances of the Court below for permanent damage, loss of rent and cost of repairs were proper and warranted by the evidence.

I. Permanent Damage

In the instant case, appellee, Pryce, was awarded \$7,500.00 as permanent damage. The items making up this loss included the racking of the floors which could not be repaired, exterior cracks and other defacing of the front of the building, the fact that the building was caused

to be vacant for an extended period and the bad reputation acquired as a result of the accident.

Lesmark contends in its brief that recovery may be had either for cost of repairs or for loss in value, whichever is less, but not for both of these elements of damage. This contention loses sight of the fact that damages to the 1917 Eye Street building were partly repairable and partly permanent. Extensive repairs were made, as the evidence shows, but the building was still defaced on the front from star bolts and cracks, the floors were still racked, its reputation was still bad and the building was vacant. Thus it seems clear that no inconsistency or duplication occurs here in awarding both, permanent damage and cost of repairs, where, as here, they are fully proven by the evidence. In the Art Club case, where the damage was partly repairable and partly permanent, the Court gave recognition to that fact, granting awards for both elements of damage.

Appellant also challenged the actual amount allowed as permanent damage. Mr. Weinberg said the property was worth \$80,000.00 at the time of the accident. It sold for \$67,500.00, after the repairs were made, including improvements added by Mrs. Pryce after the damage occurred, such as the gas furnace and air conditioning units. Factors tending to depress the sales value were the bad reputation of the building and the fact that it had been vacant for such a long period. On the resale for \$75,000.00, some of these factors had been partially eliminated. The ice had been broken on the issue of fear through the resale and partial occupancy of the building.

In the light of this evidence the Court was confronted with a determination as to the extent of the permanent damage. Mr. Weinberg's testimony established a loss of \$12,500.00 but based on the initial sale and resale of the property at \$67,500.00 and \$75,000.00, respectively, the loss would be \$7,500.00. The Court awarded this latter sum, believing it represented the best test of the market value at the time of the

sales (J.A. 170). Appellees accordingly contend that the award made by the Court for permanent damage was proper and fully supported by the evidence.

II. Loss of Rent

The sum of \$9,800.00 was granted by the Court for loss of rent. The principal challenge of appellant to this award is that it should cover the period from the date of the accident through December, 1959, and not December, 1960, as allowed. The evidence established the diligent efforts of Mrs. Pryce in seeking to locate tenants for her building, beginning in late August, 1959, before repairs had been started. She checked in every way she could with people she thought might be in need of space. In December, before Lesmark's men had finished their work, she listed the property for rental. The agent made great efforts through advertising and direct mail to locate tenants. In May, 1960, not having had success, she listed the property for both sale and rent with this agent, and two months later, listed the property for sale or rent with several other real estate firms. The Court found that Mrs. Pryce diligently endeavored to find tenants or a purchaser for her property, and it is submitted that the evidence justifies such a finding. In this connection, the charge of appellant that Mrs. Pryce refused to consider tenants who wanted to lease less than the entire building belies the testimony introduced on this issue. Mrs. Pryce testified that several prospects made offers for partial occupancy, but her agent advised they were not acceptable because of poor credit ratings (J.A. 52, 63).

The award for loss of rent included the sum of \$1,800.00 expended for heat, light and maintenance during the period repairs were being made and thereafter while the property was being shown for rent or sale. The testimony established the necessity for these items of expense as reasonably flowing from the damage caused and it is submitted that such expenses were properly included by the lower Court as a part of the rent loss.

Lesmark's contention that the rent loss should cover only the period from the accident to December, 1959, is not in accord with the holdings of this Court in the Cooper and Karr cases, supra. The latter case, in allowing a loss of rent, as previously pointed out, held damages to be recoverable up to the time of trial. Appellee Pryce therefore contends that the award for loss of rent was correct and proper, being fully warranted by the evidence and within the holdings of this Court.

In passing, it may be noted that the letters of the District Government, dated July 29 and August 28, 1959, directed Lesmark to restore the properties. Lesmark ignored these requests, taking no action toward making Mrs. Pryce's building structurally safe, until required to do so because of the issuance of the restraining order by the lower Court. More important, it was stipulated by the parties that repairs to her building were completed by March 1, 1960, and not in December, 1959, the date which Lesmark contends in its brief should have been the terminal point for the rent loss. In view of the diligent efforts of Mrs. Pryce to locate tenants or a purchaser, however, she contends the rent loss for the period through December, 1960, when the building was finally sold, and as allowed by the Court, was proper and amply supported by the evidence.

III. Cost of Repairs

The lower Court allowed appellees, Pryce and Ash, the respective sums of \$4,100.00 and \$3,472.00 for cost of repairs. Lesmark challenges these sums on the ground that the Court made no allowance for reasonable wear and tear and that both premises were placed in far better condition by the repairs than before the accident. It is submitted that Lesmark's contention as to these awards is not consistent with the weight of the evidence.

(a) 1917 Eye Street Premises

It was established that the building was in a good, tenantable condition prior to the accident. Quite apart from the improvements and repairs made from time to time by Mrs. Pryce, the tenant built in a great many specialized items and did considerable redecorating at its own expense (J.A. 55). Within the year before the accident the tenant had done over several offices. In addition, as the Ver Standig Agency took over offices vacated by other tenants, Mrs. Pryce redecorated them, until by 1957, Ver Standig occupied the entire building (J.A. 54).

Mrs. Pryce testified in detail concerning the repair items and the necessity therefor. Coupled with this are the photographs, Pl. Ex. Nos. 15 through 19, showing damage caused to the interior of the building. The evidence established that the repairs were designed to restore the building to a tenantable condition and to otherwise protect it. The bill of Electrical Associates included charges for checking the wiring throughout the building and for removing and replacing electrical fixtures and air conditioners, which was done at the suggestion of Mr. Locraft to protect the property (J.A. 62). Mr. Berry of Whiting Elevator Company said the elevator cables installed in 1946 could have lasted several more years and he believed the entire bill for elevator repairs was attributable to the accident. The portion of the Adams Redecorating Company bill covering work done on the windows was apportioned by Mrs. Pryce in line with the damage resulting. She also claimed \$548.75 on Gott's bill, but the Court disallowed \$200.00 of this amount because of enhancement due to installing asphalt tile as linoleum replacement. The bill of Ligon for retaping venetian blinds was disallowed by the Court on the ground that it was not an item of repair.

(b) 1921 Eye Street Premises

Mr. Ash's building was in excellent condition just prior to the accident. After his acquisition of the property in 1954, he had spent a substantial sum putting it in as good a condition as possible. Mr.

Mahara of Hamilton Decorating Company said the installation of the acoustical tile on the ceilings and the Marlite tile in the lavatories represented very substantial savings over what the cost would have been if replastering had been done.

The Court discounted several items on many of the suppliers' bills. The J. W. Conway bill for roof repairs in the sum of \$816.36 was allowed only to the extent of \$67.21. The Hamilton Decorating bill was reduced to \$1,515.75. The bills of James J. Madden of \$496.24 and Standard Floors, Inc. of \$215.40 were allowed in the total sum of \$131.59.

(c) As to Both Properties

The District employees, appellees and several of the suppliers testified concerning the damage, the necessity for the repairs and the cost thereof. It may be noted also that both appellees proceeded as economically as possible in the making of repairs. They obtained bids from many firms, except where the supplier had taken care of work for one or the other of appellees over a long period of time and were familiar with the respective buildings. On the basis of all the testimony relating to repairs made, it is submitted that the amounts allowed by the Court covered only needed repair of damage, and did not, as Lesmark charged, provide for improvement and enhancement beyond necessary repair.

Lesmark's final contention with respect to awards for cost of repairs is that the Court accepted the testimony of the owners without requiring any showing as to the reasonableness of the sums expended. It may be noted that no evidence was introduced by any party to the litigation challenging or contradicting in any way the expenditures of the appellees for repairs or the reasonableness thereof. It is submitted that appellees' evidence showing the work done, the necessity therefor, and proof of payment constituted prima facie evidence of the reasonableness of the repairs. The case of Wright v. Capital Transit Co., (D.C. Ct. of Appeals), 35 A.2d 183, and cases therein cited, support this position.

In concluding, on this issue, appellees contend they have established by competent and substantial evidence the losses sustained by them resulting from the accident and that the findings and conclusions of law of the lower Court with regard thereto are amply supported and should be upheld.

CONCLUSION

Appellees, Pryce and Ash, respectfully contend that the judgments entered herein by the Court below should be affirmed.

Respectfully submitted,

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BRIEF FOR APPELLEES
Walter S. Charron and Marie L. Charron

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,739
No. 17,740

LESMARK, INC.,

Appellant,

v.

PRYCE, et al.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1963

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STATEMENT OF QUESTIONS PRESENTED

These appellees accept the Statement of Questions Presented contained in the Brief for Appellees Pryce and Ash as a correct statement of the questions involved for the determination of the issues between Pryce and Ash, on the one hand, and Lesmark, on the other.

In the opinion of these appellees, the only question presented as to them is:

Was the judgment of the District Court in favor of these appellees on their cross-claim against Lesmark correct in awarding full and complete indemnification, including expenses and counsel fees, where it was based on an express contract of indemnity which included in terms "expenses" and "counsel fees"?

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BRIEF FOR APPELLEES

Walter S. Charron and Marie L. Charron

COUNTERSTATEMENT OF THE CASES

The Brief filed in behalf of appellees Pryce and Ash contains a very comprehensive Counterstatement of the proceedings and evidence which adequately covers the basic issues involved in these appeals as between appellant and appellees Pryce and Ash. No purpose would be served by a repetition of any part of this Counterstatement (see Brief of Appellees Pryce and Ash, pp. 1-16).

On the relatively narrow issue presented by this appeal with respect to the appellees Charron the aforementioned Counterstatement should be supplemented as follows:

The construction contract between appellant Lesmark and these appellees, as owners, provided in Article 1 that the Specifications were expressly made a part of the contract (Plaintiffs' Exhibit 53, J.A. 173). Paragraph 13(e) of the Specifications provided:

"(e) Should any person or persons or property be damaged or injured, including injuries causing or resulting in death, by the contractor, or by any person or persons employed under them, in the course of the performance by them of this agreement, or otherwise resulting from any action or operation under this agreement, whether by negligence or otherwise, said contractor shall alone be liable, responsible and answerable therefor and does hereby agree, to and with said Owner, to hold harmless and indemnify the Owner of and from all claims, suits, actions, costs, counsel fees, expenses, damages, judgments or decrees by reason thereof." (Underscoring supplied) (Plaintiffs' Exhibit 58, J.A. 173-174).

The cross claim in the court below by these appellees against Lesmark was based on this express contractual provision. In the course of the closing arguments by counsel to the trial Court it was contended that this claim for contractual indemnity properly included allowance for costs, expenses and counsel fees incurred by appellees in the defense of the actions asserted in the plaintiffs' complaint and, in response to interrogation by the Court, counsel for these appellees briefly stated the time devoted and nature of the services he had been required to perform in their behalf, including the time of the trial itself, with which the trial judge was, of course, thoroughly familiar (J.A. 167).

The Court then inquired of counsel for Lesmark if he wished to comment on the claim for attorneys' fees. The colloquy appears at J.A. 168, in which Mr. Maurice Friedman, who represented Lesmark below, stated:

"No, I can't comment on it except to say that if I were in Mr. Edgerton's position, I would simply claim the same thing. This is fair and reasonable compensation if he is entitled to it."

For reasons more fully hereinafter discussed, counsel for these appellees Charron filed no post-trial motions in the District Court and took no appeal from the judgments of that Court entered in favor of appellees Pryce and Ash. The time for noting such an appeal expired during the pendency of a motion for new trial filed below by appellant Lesmark. After Lesmark's motion for new trial was denied and the present appeals were taken, counsel for the Carrons sought to stay execution on the judgments against the Charrons as this was the only possible means available to protect the rights of all parties by preservation of the status quo during the pendency of these appeals. However, motions for a stay, which offered to give adequate supersedeas or other security, the first addressed to the District Court which was denied by Judge Tamm on March 27, 1963, and the succeeding motion for a stay addressed to this Court, filed herein April 11, 1963, which was denied by per curiam order of this Court entered herein May 6, 1963. Stay of execution having been denied in both Courts the Charrons had no alternative, aside from running the risk of levy of execution against them, except to satisfy the judgments, which was done, and praecipe satisfying the judgments of both Pryce and Ash against the Charrons was filed in the District Court on May 24, 1963.

SUMMARY OF ARGUMENT

The law does not require a party against whom a multiple-party judgment has been rendered to appeal from that judgment, particularly where such party is convinced that the law and evidence validly supports such judgment against him and that any appeal he might take therefrom would be without merit. And no duty to appeal can be interpolated into this situation at the behest of another of the parties to the same judgment on the curious contention that such appeal is the only way to protect the alleged rights of the latter.

Regardless of the disposition of the issues as between the appellant Lesmark and appellees Pryce and Ash (and counsel for these appellees, the Charrons, herein frankly supports the correctness of the judgments in favor of Pryce and Ash as to all parties), the Charrons are without question entitled to full and complete indemnification from Lesmark for any and all amounts which this litigation has cost them and for which Pryce and Ash have recovered against them, based on the express contract of indemnity included in the Contract Specifications and made a part of the contract papers between the Charrons, as the owners of the property, and Lesmark, the building contractor.

This right to full and complete indemnity clearly includes expenses and counsel fees by the express terms of this contract.

ARGUMENT

I.

THE JUDGMENTS AGAINST THESE APPELLEES BELOW WERE
JUSTIFIED BY THE LAW AND THE EVIDENCE AND NO
APPEAL THEREFROM WOULD HAVE BEEN MERITORIOUS

Although counsel for these appellees, the Charrons, strenuously opposed the entry of judgments against them in favor of the plaintiffs below, Pryce and Ash, and extensively argued both the evidence and the law in an oral motion for a finding in their favor at the conclusion of the plaintiffs' cases, he is now convinced that on the evidence before Judge Tamm, as disclosed by this record, and ably summarized in the Counterstatements of the Cases by counsel for Pryce and Ash, that the judgments were correct both on the evidence and the law. The grounds of liability of these owners of the real estate to their adjoining owners on either side is fully discussed in the Brief filed in behalf of Pryce and Ash (pp. 23-25) and on either of the grounds of liability there advanced, i.e., the non-delegable duty imposed by the common law on a property owner, or the obligation of the owner to comply with the D. C.

Building Code with respect to adjoining property, the law supports these judgments. On the first ground of liability the early decisions of this Court in District of Columbia v. Blackman, 32 App. D.C. 32, and Philadelphia, B. & W. R. Co. v. Karr, 38 App. D.C. 193, would seem to be dispositive of this question. There also seems to be no valid answer to the clear requirements of the D. C. Building Code in the situation presented here.

It is a curious turn of events to note that counsel for appellant now advances substantially the same arguments, and relies on some of the same authorities advanced by counsel for the Charrons below, in support of the contention which Lesmark in its Brief now makes, in order to avoid liability on its contractual indemnity to the Charrons, that there is no foundation in law to support the judgments against the Charrons.

For reasons already stated, counsel for the Charrons, being satisfied that there was foundation both in the evidence and the law for the entry of the judgments, filed no motion for new trial in the District Court and no appeal was taken therefrom. Counsel for Lesmark seeks now to penalize the Charrons by their failure to take an appeal which would have been wholly without merit. No reason of substance is advanced in support of this unique contention that a party against whom a joint and several judgment has been entered is required to take an appeal in order to protect the nebulous rights of the other party against whom the same joint and several judgment has been entered. It is obvious on this record that the only reason this argument is now made by Lesmark is to attempt to avoid liability on the Charrons' cross-claim based on the express contract of indemnity.

II.

APPELLEES ARE CLEARLY ENTITLED TO FULL
AND COMPLETE CONTRACTUAL INDEMNITY
AGAINST LESMARK, THE CONTRACTOR

In order to be protected against the very kind of firm claim of liability which has been invoked here against a property owner, the contract here between this owner (the Charrons) and the building contractor expressly provides that the contractor will indemnify and protect the owner against any and all claims which might be asserted against the owner arising from the performance of the contemplated work. The express agreement for indemnification is drawn in the clearest and most sweeping terms. See Article 13(e) of the Specifications (Plaintiffs' Exhibit 58, J.A. 173-174, and quoted supra in the Counterstatement). No attempt is made to avoid the clear intendment of this provision and indeed none could be made. Such indemnity provisions are necessary and usual in this type of construction work and their validity has been clearly established. See Moses-Ecco Company v. Roscoe-Ajax Corporation, May 16, 1963, ____ U.S. App. D.C. ____, 320 F.2d 685, and cases therein cited and discussed.

Accordingly, it is submitted that there is no escape for Lesmark from the judgment on the cross-claim of the Charrons based on this express agreement for indemnification which so explicitly applies to the facts and circumstances of these cases.

III.

UNDER THE EXPRESS PROVISION OF THE CONTRACT
SUCH FULL AND COMPLETE INDEMNITY INCLUDES
"COSTS, COUNSEL FEES", AND "EXPENSES"

By its separate judgment the District Court awarded the Charrons the sum of \$2,000 for their expenses and counsel fees for the defense of the suits brought by Pryce and Ash.

There can be no serious contention made that this judgment is not supported by the law. This contract expressly provided for indemnification for all "costs, counsel fees" and "expenses", as well as for all judgments, damages, etc. (See Specifications 13(e), J.A. 173-174, and supra in the Counterstatement). That such express agreements to indemnify will support indemnification for costs, expenses and attorneys' fees has now been firmly established by this Court in its recent decision in Moses-Ecco Company v. Ajax Construction Corporation, supra, in which this Court stated:

"We think that the agreement of Moses-Ecco to indemnify Roscoe-Ajax for 'any and all loss, cost, damage or expense' clearly includes attorneys' fees."

The provision in the instant case is, of course, even stronger because this agreement in terms includes "counsel fees", supra.

Nor can there be any serious question as to the amount of the award. The colloquy in the trial Court between Court and counsel with respect to the basis of the award is set forth in the Joint Appendix (J.A. 167-168) and again in the Counterstatement, supra. Lesmark can not now be heard to contest the amount when its counsel below agreed that the estimated fee suggested by counsel for the Charrons was "fair and reasonable compensation" (J.A. 168).

CONCLUSION

The judgments of the District Court in favor of appellees Pryce and Ash are supported by the evidence in this record and by the law and should be upheld.

The judgments of the District Court on the cross-claim of the Charrons against Lesmark should be affirmed on the basis of the express contract for indemnity both (1) as to the award of the full amount

of the recoveries made by Pryce and Ash against the Charrons, and
(2) as to the separate award in the sum of \$2,000 for counsel fees and
expenses.

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